DOCKET

No. 07-214
Title: Allison Engine Company, Inc., et al., Petitioners
v.
United States, ex rel. Roger L. Sanders and Roger L. Thacker
Docketed: August 20, 2007
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (05-3502)
Decision Date: December 19, 2006
Rehearing Denied: April 20, 2007
Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 25 2007	Application (06A1227) to extend the time to file a petition for a writ of certiorari from July 19, 2007 to August 20, 2007, submitted to Justice Stevens.
Jun 27 2007	Application (06A1227) granted by Justice Stevens extending the time to file until August 20, 2007.
Aug 17 2007	Petition for a writ of certiorari filed. (Response due September 19, 2007)
Sep 5 2007	Consent to filing of any amicus curiae brief relating to the petition for writ of certiorari received from counsel for the petitioners.
Sep 19 2007	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States of America.
Sep 19 2007	Brief of respondents United States, ex rel. Roger L. Sanders and Roger L. Thacker in opposition filed.
Oct 2 2007	Reply of petitioners Allison Engine Company, Inc., et al. filed.
Oct 3 2007	DISTRIBUTED for Conference of October 26, 2007.
Oct 3 2007	Opposition of respondents Roger L. Sanders and Roger L. Thacker to motion of Chamber of Commerce of the United States of America for leave to file brief amicus curiae filed. (Distributed)
Oct 29 2007	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States of America GRANTED.
Oct 29 2007	Petition GRANTED.
Dec 5 2007	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioners.
Dec 13 2007	Joint appendix filed. (Statement of costs filed)
Dec 13 2007	Brief of petitioners Allison Engine Company, Inc., et al. filed.
Dec 19 2007	Motion for leave to file amici brief filed by Continental Common, Inc., et al.
Dec 20 2007	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Dec 20 2007	Brief amicus curiae of Washington Legal Foundation filed.
Dec 21 2007	SET FOR ARGUMENT ON Tuesday, February 26, 2008.
Jan 7 2008	Motion for leave to file amici brief filed by Continental Common, Inc., et al. GRANTED.
Jan 11 2008	Record received from U.S.C.A. for the Sixth Circuit. (1 binder)
Jan 14 2008	Brief of respondents Roger L. Sanders and Roger L. Thacker filed.
Jan 16 2008	CIRCULATED.
Jan 21 2008	Brief amicus curiae of Marsha Farmer filed. (Distributed)

Jan 21 2008	Brief amicus curiae of Joel D. Hesch filed. (Distributed)
Jan 22 2008	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed. (Distributed)
Jan 22 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 22 2008	Brief amicus curiae of Grayson & Kubli PC filed. (Distributed)
Jan 22 2008	Brief amicus curiae of Senator Charles E. Grassley filed. (Distributed)
Jan 22 2008	Brief amicus curiae of United States filed. (Distributed)
Jan 23 2008	Record received from the U.S.D.C. for the Southern District of Ohio. (6 boxes) (Portions of this record is electronically filed) (There are sealed documents in this record)
Feb 13 2008	Reply of petitioners Allison Engine Company, Inc., et al. filed.
Feb 15 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 26 2008	Argued. For petitioners: Theodore B. Olson, Washington, D.C. For respondents: James B. Helmer, Jr., Cincinnati, Ohio; and Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)
Feb 27 2008	Additional record received from the U.S.C.A. for the 6th Circuit. (1 box containing 3 volumes of the joint appendix)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
07-214 AUG 17 2007
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

[Additional Counsel Listed on Inside Cover]

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

QUESTION PRESENTED

Sections 3729(a)(2) and 3729(a)(3) of the False Claims Act impose liability upon anyone who uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government" or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(2), (a)(3). In direct conflict with the decisions of four other circuits, the Sixth Circuit held that Sections 3729(a)(2) and 3729(a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds." The question presented is whether a plaintiff asserting a cause of action under Section 3729(a)(2) or Section 3729(a)(3) of the False Claims Act is required to prove that a false claim was submitted to the federal government, or whether it is sufficient to establish that the claim was paid using federal funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, General Motors Corporation, General Tool Company, and Southern Ohio Fabricators were defendants-appellees below and are petitioners in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Rolls-Royce North America Holdings, Inc., and Rolls-Royce Group plc are the parent companies of Rolls-Royce Corporation, f/n/a Allison Engine Company, Inc., and that no other publicly held company owns 10% or more of its stock. General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., have no parent companies and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CONFLICTS WITH FOUR OTHER CIRCUITS' READINGS OF SECTIONS 3729(a)(2) AND (a)(3) 11

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT 18

III. THE SIXTH CIRCUIT'S ERRONEOUS READING OF SECTIONS 3729(a)(2) AND (a)(3) RAISES ISSUES OF EXCEPTIONAL IMPORTANCE TO ALL GOVERNMENT CONTRACTORS 21

CONCLUSION 27

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit 1a

APPENDIX B: Opinion of the United States District Court for the Southern District of Ohio 38a

APPENDIX C: Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing and Rehearing En Banc 62a

TABLE OF AUTHORITIES

Page(s)

CASES

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 23

Corsello v. Lincare, Inc.,
428 F.3d 1008 (11th Cir. 2005) 16, 17

Fid. Fed. Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 27

Forsham v. Harris,
445 U.S. 169 (1980) 20

Metric Constructors, Inc. v. United States,
314 F.3d 578 (Fed. Cir. 2002) 26

Tanner v. United States,
483 U.S. 107 (1987) 10, 18, 19, 20, 25

United States v. Bornstein,
423 U.S. 303 (1976) 21

United States v. Gibbs, 704 F.2d 464
(9th Cir. 1983) (per curiam) 22

United States v. Lagerbusch,
361 F.2d 449 (3rd Cir. 1966) 15

United States v. McNinch,
356 U.S. 595 (1958) 11, 26

United States v. Orleans,
425 U.S. 807 (1976) 20

United States ex rel. Aakhus v. Dyncorp, Inc.,
136 F.3d 676 (10th Cir. 1998) 3

United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc., 459 F. Supp. 2d 1081 (D. Kan. 2006) 14

United States ex rel. Crews v. NCS Healthcare of Ill., Inc., 460 F.3d 853 (7th Cir. 2006) 3, 16

United States ex rel. DRC, Inc. v. Custer Battles, LLC, 472 F. Supp. 2d 787 (E.D. Va. 2007) 18

United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552 (8th Cir. 2006) 15

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 21

United States ex rel. Maxfield v. Wasatch Constructors, 2005 U.S. Dist. LEXIS 10162 (D. Utah 2005) 18

United States ex rel. Quinn v. Omnicare Inc., 382 F.3d 432 (3d Cir. 2004) 15

United States ex rel. Taylor v. Gabelli, 345 F. Supp. 2d 313 (S.D.N.Y. 2004) 4, 25

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005) ..... *passim*

STATUTES

10 U.S.C. § 2306a 6

18 U.S.C. § 371 ..... 10, 18, 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1
31 U.S.C. § 3729 2
31 U.S.C. § 3729(a) 5
31 U.S.C. § 3729(a)(1) ..... *passim*
31 U.S.C. § 3729(a)(2) ..... *passim*
31 U.S.C. § 3729(a)(3) ..... *passim*
31 U.S.C. § 3729(c) 13, 22
31 U.S.C. § 3730(b)(1) 4
31 U.S.C. § 3730(b)(2) 5
31 U.S.C. § 3730(b)(4) 5
31 U.S.C. § 3730(d)(1)-(2) 5

REGULATIONS

28 C.F.R. § 85.3(a)(9) 5

OTHER AUTHORITIES

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 24
H.R. Rep. No. 97-651 (1982) 24
U.S. Government Accountability Office, Information on False Claims Act Litigation (2005) 17, 26

PETITION FOR A WRIT OF CERTIORARI

Petitioners Allison Engine Company, Inc., General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 471 F.3d 610. Pet. App. 1a. The order denying the petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 62a. The opinion of the United States District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569. *Id.* at 38a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on December 19, 2006. It denied petitioners' timely petition for rehearing and petition for rehearing en banc on April 20, 2007. On June 27, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 20, 2007. No. 06A1227. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

STATEMENT

This case provides the Court with the opportunity to resolve a direct and acknowledged circuit split regarding the fundamental requirements for recovering under the False Claims Act ("FCA")—an issue of exceptional importance to the thousands of businesses that regularly perform work on government contracts. In the decision below, the Sixth Circuit explicitly broke ranks with other circuits' well-reasoned interpretations of the FCA's plain language, and exposed businesses in the defense, build-

ing, and professional services industries (among many others) to vastly expanded FCA liability that Congress never intended to impose.

In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit held that a plaintiff pursuing a cause of action under Section 3729(a)(2) of the FCA, 31 U.S.C. § 3729(a)(2), must prove that a false claim for payment was actually submitted to the federal government for payment or approval. In the decision below, the Sixth Circuit expressly "disagree[d] with the *Totten* court's interpretation of the FCA" (Pet. App. 10a), and concluded that a plaintiff asserting a cause of action under Section 3729(a)(2), or a derivative conspiracy cause of action under Section 3729(a)(3), need not establish that the claim was ever presented to the government. *Id.* at 23a. According to the Sixth Circuit, it is sufficient for purposes of Sections 3729(a)(2) and (a)(3) that a "false claim[ ] made to [a] part[y] other than the government . . . will be paid with government funds." *Id.* at 9a. These squarely conflicting decisions deepened the lower courts' already widespread disagreement regarding the existence of a "presentment" requirement in Sections 3729(a)(2) and (a)(3). *Compare, e.g., United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) ("To establish a claim under (a)(2), a person must demonstrate that . . . a 'claim' was presented to the government by the defendant, or the defendant 'caused' a third party to submit the 'claim'"), *with United States ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 856 & n.1 (7th Cir. 2006) (holding that Section 3729(a)(2) does not require submission of a false claim to the federal government).

This Court's review is warranted to resolve the direct and irreconcilable circuit split exacerbated by the decision below, to provide government contractors with authoritative guidance regarding their potential FCA liability, and to restore the reasonable textual limitations that Congress established on the FCA's scope.

1. The FCA was enacted in 1863 in response to the extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. As amended, the statute provides the federal government with a cause of action against anyone who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" (31 U.S.C. § 3729(a)(1)), or who "knowingly makes [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government" (*id.* § 3729(a)(2)). The statute also provides a derivative conspiracy cause of action against persons who "conspire[ ] to defraud the Government by getting a false or fraudulent claim allowed or paid" (*id.* § 3729(a)(3)), which applies to persons who have conspired to commit the fraudulent conduct proscribed by Sections 3729(a)(1) and (a)(2). *See, e.g., United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004) (dismissing a relator's conspiracy claim under Section 3729(a)(3) because he "ha[d] not pled actionable claims under sections 3729(a)(1)-(2)").

An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." 31 U.S.C. § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed

under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the suit. *Id.* § 3730(b)(4).

A defendant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

2. Petitioners Allison Engine Company, Inc., General Tool Company, and Southern Ohio Fabricators, Inc., served as three of the hundreds of subcontractors responsible for a portion of the construction of the U.S. Navy's Arleigh Burke-class Guided Missile Destroyers. Pet. App. 2a. The two private shipyards that were prime contractors on the project subcontracted construction of the ships' generator sets to Allison Engine Company (then a subdivision of General Motors Corporation), which subcontracted part of its responsibilities to General Tool Company, which in turn subcontracted a portion of its work to Southern Ohio Fabricators. *Id.*

Respondents, former employees of General Tool Company, initiated this suit under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA, alleging that petitioners defrauded the federal government by submitting claims for payment under their subcon-

tracts with the knowledge that their work did not conform to contract specifications. Pet. App. 3a. The United States declined to intervene in the suit. *Id.*[1]

3. After respondents had presented their case to a jury, the United States District Court for the Southern District of Ohio granted petitioners' motion for judgment as a matter of law because respondents failed to introduce evidence that any claim for payment was ever submitted to the federal government for payment or approval. Pet. App. 60a. Respondents established that Southern Ohio Fabricators had submitted claims to General Tool, that General Tool had submitted claims to Allison Engine, and that Allison Engine had submitted claims to the two prime contractors. There was no evidence, however, that petitioners' claims for payment had been presented to the federal government, either by petitioners themselves or by the prime contractors. *Id.* at 59a.

Finding "the detailed opinion" in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), to be "persuasive," the district court held that "presentment" of the allegedly false claims to the government was an element of the FCA causes of action that respondents were asserting under Sections 3729(a)(1), (a)(2), and (a)(3). Pet. App. 56a. In the absence of any evidence of presentment, the court concluded that respondents' claims failed as a matter of law. *Id.* at 60a.

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[1] Respondents also brought claims under the Truth in Negotiations Act, 10 U.S.C. § 2306a. The Sixth Circuit affirmed the district court's grant of summary judgment to petitioners on those claims (Pet. App. 33a), and they are not at issue in this petition.

4. A divided panel of the Sixth Circuit reversed. Expressly "disagree[ing] with the *Totten* court's interpretation of the FCA," the court of appeals held that, although Section 3729(a)(1) does require presentment of a false claim to the government, Sections 3729(a)(2) and (a)(3) do not include a presentment requirement and thus do not require proof that an allegedly false claim was ever submitted to the federal government for payment or approval. Pet. App. 10a. According to the panel majority, Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds," even if no claim ever passes in front of a government official. *Id.* at 9a.

The Sixth Circuit premised this holding on its reading of the statutory language of Sections 3729(a)(1) through (a)(3), and its conclusion that "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government." Pet. App. 7a. The panel majority accused the *Totten* court of "hav[ing] misread the plain language of the statute," and found unpersuasive the D.C. Circuit's holding that the language "paid or approved by the Government" in Section 3729(a)(2) requires the submission of a claim to the federal government for payment or approval. *Id.* at 15a. According to the panel majority, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever it is "paid with government funds." *Id.* at 8a.

The Sixth Circuit also rejected the *Totten* court's conclusion that the absence of a presentment requirement in Section 3729(a)(2) "would make the presentment requirement in subsection (a)(1) 'largely meaningless.'" Pet. App. 12a (quoting *Totten*, 380

F.3d at 501). In response to the D.C. Circuit's observation that a presentment requirement is necessary in Section 3729(a)(2) to prevent litigants from circumventing the presentment requirement in Section 3729(a)(1), the panel majority asserted that "[S]ection (a)(2) contains its own more burdensome requirement" not found in Section (a)(1)—*i.e.*, that "the claim must have actually been paid." *Id.*

Having concluded that the "*Totten* court erred in reading a presentment requirement into all subsections of the" FCA, Pet. App. 23a, and that submission of a claim to the government is not an element of the causes of action under Sections 3729(a)(2) and (a)(3), the Sixth Circuit reversed the judgment as a matter of law in favor of petitioners. Respondents' claims under Sections 3729(a)(2) and (a)(3) should reach a jury, the Sixth Circuit held, because "[d]uring trial, [respondents] put forth evidence that all of the money paid to [petitioners] came from the United States government." *Id.* at 24a.

Judge Batchelder dissented, and would have held that presentment is an element of the causes of action under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA. Pet. App. 33a. Embracing the D.C. Circuit's reasoning in *Totten*, Judge Batchelder emphasized that the plain language of the FCA distinguishes between allegations that a defendant defrauded the federal government—which can support FCA liability—and allegations that a defendant defrauded a federal grantee—which cannot. *Id.* at 34a-35a. "Payment of a claim 'by the government'" under Section 3729(a)(2), Judge Batchelder reasoned, "presupposes that the claim has been presented to the government as a request for that payment." *Id.* at 34a. Disagreeing with the panel majority's assertion that any claim paid with federal funds can be

deemed "paid . . . by the government," Judge Batchelder responded that the "term 'by the Government' is not the same as 'with government funds'" because the "former connotes action," while the "latter mere association." *Id.* She also emphasized that the panel majority's effort to prevent evasion of Section 3729(a)(1)'s presentment requirement was unavailing because the only authority that the majority cited to support the proposition that a "claim must have actually been paid" to give rise to Section 3729(a)(2) liability actually stood for the contrary proposition that payment is not required. *Id.* at 36a.

Because respondents "not only failed but actually refused to produce any evidence that any claim was presented . . . to the government for payment," Judge Batchelder would have affirmed the judgment in favor of petitioners. Pet. App. 37a.

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an already extensive circuit split regarding the existence of a "presentment" requirement in Sections 3729(a)(2) and (a)(3) of the FCA. It also conflicts with this Court's interpretation of an indistinguishable fraud statute and misconstrues the plain language of the FCA, thereby expanding the statute well beyond the limits imposed by Congress. For all of these reasons, this Court's review is warranted.

The Sixth Circuit's holding that FCA liability can attach whenever "the claim will be paid with government funds" (Pet. App. 9a) is directly and explicitly at odds with *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), where the D.C. Circuit held that a claim must be "'paid or approved *by the Government*'" itself—rather than by a recipient of federal funding—to give rise to FCA

liability. *Id.* at 498 (quoting 31 U.S.C. § 3729(a)(2) (emphasis in original)). The Third, Eighth, and Eleventh Circuits agree with the D.C. Circuit that presentment of a false claim to the federal government is a prerequisite to liability under Sections 3729(a)(2) and (a)(3). The Seventh Circuit, on the other hand, has endorsed the Sixth Circuit's position that submission of a claim to a private entity that receives federal funds is sufficient to trigger FCA liability. Only this Court can authoritatively resolve this sharply divisive and frequently recurring issue.

The Sixth Circuit's conclusion that fraud directed at any federally funded private entity can give rise to FCA liability is also flatly inconsistent with this Court's holding in *Tanner v. United States*, 483 U.S. 107 (1987), that a conspiracy to defraud a federal grantee does not constitute a "'conspir[acy] . . . to defraud the United States.'" *Id.* at 128 (quoting 18 U.S.C. § 371). Only where a defendant "conspired to cause [the federal grantee] to make misrepresentations to the [government]," the *Tanner* Court explained, has there been a conspiracy to defraud the United States. *Id.* at 132. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) apply to fraud directed at a federally funded contractor is utterly at odds with *Tanner*'s reasoning.

The Sixth Circuit's statutory analysis is also deeply flawed on its own terms. Sections 3729(a)(2) and (a)(3) apply to persons who "get a false or fraudulent claim paid or approved by the Government" (31 U.S.C. § 3729(a)(2)), or who "conspire[ ] to defraud the Government" (*id.* § 3729(a)(3)). The Sixth Circuit effectively substituted the words "federally funded private entity" for the "Government" in each of these provisions. As the D.C. Circuit recognized in *Totten*, and Judge Batchelder reiterated in

her dissent, however, "get[ting] a false claim paid or approved by [a federal grantee] is *not* . . . 'get[ting] a false or fraudulent claim paid or approved by the Government.'" 380 F.3d at 498 (quoting 31 U.S.C. § 3729(a)(2)) (emphasis added); *see also* Pet. App. 34a (Batchelder, J., dissenting).

The staggering implications of the Sixth Circuit's decision amplify the need for this Court's review. The Sixth Circuit's expansive reading of Sections 3729(a)(2) and (a)(3) extends the FCA to claims submitted to any private entity that receives federal funding and that uses a portion of that funding to pay a claim—thereby displacing state common-law fraud causes of action designed to resolve disputes between private parties, in favor of the FCA's onerous civil penalty and treble-damages provisions designed to remedy "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). The consequences of this decision will be most dramatic for subcontractors on government projects, who—at least in the Sixth and Seventh Circuits—are now confronted with potentially crippling FCA liability whenever they submit claims for payment to a federally funded prime contractor or higher-tier subcontractor, whether or not a claim for payment is ever submitted to the government.

The petition for a writ of certiorari should be granted to resolve this pervasive lower-court conflict and to reject the Sixth Circuit's profoundly flawed reading of the FCA.

I. THE DECISION BELOW CONFLICTS WITH FOUR OTHER CIRCUITS' READINGS OF SECTIONS 3729(a)(2) AND (a)(3).

The direct conflict between the D.C. Circuit's decision in *Totten* and the Sixth Circuit's holding in the

decision below is part of an extensive division among the circuits regarding the existence of a presentment requirement in Sections 3729(a)(2) and (a)(3) of the FCA.

A. In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit, in an opinion authored by then-Judge Roberts, concluded that Section 3729(a)(2) of the FCA did not apply to the submission of allegedly false claims for payment to Amtrak. *Id.* at 498. The court held that Section 3729(a)(2) requires proof that a claim was actually presented to the government and that the relator's claim therefore failed because there was no evidence that Amtrak, which is not a government entity, ever passed the defendants' claims along to a government official. *Id.* at 502.

The D.C. Circuit identified a presentment requirement in the "paid or approved by the government" language of Section 3729(a)(2). 380 F.3d at 498. "Making false records or statements to get a false claim paid or approved by Amtrak," the court reasoned, "is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* (quoting 31 U.S.C. § 3729(a)(2)).[2]

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[2] The decision drew a lengthy dissent from Judge Garland. Like the Sixth Circuit, he read the "paid or approved by the government" language in Section 3729(a)(2) as requiring only a "false claim[ ] paid with government money," rather than a false claim actually submitted to the government for payment or approval. *Totten*, 380 F.3d at 505 (Garland, J., dissenting). Judge Garland premised much of his analysis on the FCA's definition of the term "claim," which includes:

The Sixth Circuit's conclusion in the decision below is directly at odds with the D.C. Circuit's holding in *Totten*. Asserting that "the *Totten* court erred in reading a presentment requirement into all subsections of the False Claims Act," the Sixth Circuit held that "subsections (a)(2) and (a)(3) do not require . . . a showing" that "a claim has been presented to the government." Pet. App. 23a. "Rather," the court continued, "a relator under these two subsections must show that government money was used to pay the false or fraudulent claim." *Id.* Because respondents introduced evidence at trial that the claims for payment that petitioners submitted to other subcontractors and to the project's prime contractors were "paid with government funds," the panel majority held that respondents were entitled to reach the jury on their claims under Sections 3729(a)(2) and (a)(3). *Id.* at 9a, 24a. The panel majority reached this conclusion even though it is undisputed that respondents did not produce any evidence that a claim for payment was ever submitted to the federal government. *Id.* at 24a.

[Footnote continued from previous page]

> any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). According to Judge Garland, a presentment requirement in Section 3729(a)(2) would nullify this definition by excluding from the FCA's reach claims that grantees pay with government funds. *Totten*, 380 F.3d at 511.

The conflict between the holdings of the D.C. Circuit in *Totten* and the Sixth Circuit in the decision below is explicit and irreconcilable. Indeed, the United States itself has acknowledged the existence of this circuit split. *See* Br. of the United States as *Amicus Curiae* at 10, *United States ex rel. DRC, Inc. v. Custer Battles, LLC* (4th Cir. filed June 8, 2007) (No. 07-1220) ("the Sixth Circuit has addressed the same presentment issue [as the D.C. Circuit in *Totten*] and has reached the diametrically opposite conclusion").

That conflict encompasses not only whether Section 3729(a)(2) includes a presentment requirement but also whether Section 3729(a)(3) requires presentment. Although the D.C. Circuit did not explicitly address that issue, its holding necessarily extends to Section 3729(a)(3) because that section imposes liability for conspiracies to engage in the conduct proscribed by Sections 3729(a)(1) and (a)(2). The scope of liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2). *See, e.g., United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Because [relator's] FCA claims [under Sections 3729(a)(1) and (a)(2)] fail to state a claim, there can be no conspiracy" under Section 3729(a)(3)). In light of the derivative nature of Section 3729(a)(3), the D.C. Circuit's holding that both Sections 3729(a)(1) and (a)(2) require the submission of a claim to the government for payment or approval necessarily establishes that liability can attach under Section 3729(a)(3) *only* where a defendant has engaged in a conspiracy to submit a false or fraudulent claim to the government.

B. The division among the circuits regarding the existence of a presentment requirement in Sections 3729(a)(2) and (a)(3) extends well beyond the D.C. Circuit's decision in *Totten* and the Sixth Circuit's holding in the decision below. The split is pervasive and therefore highly unlikely to be resolved without this Court's intervention.

The Third, Eighth, and Eleventh Circuits agree with the D.C. Circuit that Sections 3729(a)(2) and (a)(3) include a presentment requirement. In *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004), the Third Circuit unequivocally endorsed a presentment requirement, explaining that "[i]n order to prove FCA liability under §§ 3729(a)(1) and (2)"—and, hence, under the derivative conspiracy cause of action in Section 3729(a)(3)—a relator "must prove that . . . the defendant presented or caused to be presented to an agent of the United States a claim for payment." *Id.* at 438 (internal quotation marks omitted).[3]

Similarly, in *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir. 2006), the Eighth Circuit held that Section "[3729](a)(3) . . . subjects to civil liability entities that knowingly . . . conspire to submit false claims to the government for payment or approval." *Id.* at 556. The Eleventh Cir-

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[3] The lower courts' profound confusion over the presentment issue is exemplified by the fact that the Third Circuit had earlier held that the FCA applies to all claims paid with government funds, without regard to presentment. *See United States v. Lagerbusch*, 361 F.2d 449, 449 (3rd Cir. 1966) (per curiam) (holding that the FCA applied to claims that a private corporation had paid with government funds, and asserting that there was "no doubt that the False Claims Act covers such an indirect mulcting of the government").

cuit endorsed the same interpretation of the FCA in *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), where the court explained that Section "[3729](a)(2) of the False Claims Act subject[s] to civil liability entities that knowingly submit false or fraudulent claims to the government for payment or approval." *Id.* at 1012. "The act of submitting a fraudulent claim to the government," the court continued, "is the *sine qua non* of a False Claims Act violation." *Id.* (internal quotation marks omitted).

The Seventh Circuit, however, has sided with the Sixth Circuit's position that presentment is not an element of the causes of action under Sections 3729(a)(2) and (a)(3). In *United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006), the Seventh Circuit concluded that a relator's claims under Section 3729(a)(1) failed because there was no evidence that a false claim was ever submitted to the government, while also holding that the relator's Section 3729(a)(2) claim could proceed without evidence of presentment. *Id.* at 856 n.1. The court explained that it would "ignore [the relator's] claim based on subsection (1), as it [was] undisputed at summary judgment that [the defendant] never filed any claim with an officer or employee of the United States." *Id.* Despite the absence of any evidence of presentment, the court reached the merits of the relator's Section 3729(a)(2) claim because, according to the Seventh Circuit, liability attaches under that section whenever "(1) the defendant made a statement in order to receive money from the government, (2) the statement was false, and (3) the defendant knew it was false." *Id.* at 856 (internal quotation marks omitted). Like the Sixth Circuit, then, the Seventh Circuit does not consider submission of

the allegedly false claim to the government to be an element of a Section 3729(a)(2) cause of action.

C. The extensive disagreement among the circuits as to whether Sections 3729(a)(2) and (a)(3) of the FCA include a presentment requirement represents a compelling reason for this Court to grant review. The lack of uniformity among the lower courts' interpretations of these provisions generates regulatory confusion for the thousands of businesses—in the defense, building, and professional services industries, among others—that regularly perform subcontracts on federally funded projects. In the Sixth and Seventh Circuits, those businesses are exposed to potential FCA liability whenever they submit a claim for payment to a prime contractor or higher-tier subcontractor, "so long as the claim will be paid with government funds" (Pet. App. 9a) and regardless of whether a claim is ever submitted to the federal government for payment or approval. Conversely, in the Third, Eighth, Eleventh, and D.C. Circuits, a subcontractor can be held liable under Sections 3729(a)(2) and (a)(3) only where it "knowingly submit[s] false or fraudulent claims to the government for payment or approval" (*Corsello*, 428 F.3d at 1012), whether by directly presenting the claim to the government or submitting it to a prime contractor or higher-tier subcontractor who subsequently passes the claim along to the government for its review.

In light of the recent proliferation of FCA litigation, the Question Presented in this case is a frequently recurring one with profound real-world consequences. *See* U.S. Government Accountability Office, Information on False Claims Act Litigation 25 (2005), *at* http://www.gao.gov/new.items/d06320r.pdf [hereinafter GAO Report] (indicating that the aver-

age annual number of *qui tam* FCA filings between 2001 and 2005 is more than double the average number for 1991 through 1995). In the absence of this Court's review, the question whether Sections 3729(a)(2) and (a)(3) require presentment will continue to divide the lower courts and foster intolerable legal uncertainty in suits in which tens, and often hundreds, of millions of dollars in damages are at stake. *Compare United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 790 n.4 (E.D. Va. 2007) (finding the Sixth Circuit's "recent h[o]ld[ing] that presentment is not required under 31 U.S.C. § 3729(a)(2)-(3)" to be "unpersuasive"), *with United States ex rel. Maxfield v. Wasatch Constructors*, 2005 U.S. Dist. LEXIS 10162, at *29 (D. Utah 2005) (finding "the analysis of the *Totten* dissent . . . to be persuasive").

This Court should grant certiorari to provide the lower courts with authoritative guidance on this exceptionally important and frequently recurring issue.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) of the FCA do not include a presentment requirement also conflicts with this Court's resolution of a nearly identical issue in *Tanner v. United States*, 483 U.S. 107 (1987).

In *Tanner*, this Court held that defendants who allegedly conspired to defraud a private company that received federal financial assistance did not engage in a "conspir[acy] . . . to defraud the United States" within the meaning of 18 U.S.C. § 371 because a private entity that receives federal funding does not constitute the "United States." 483 U.S. at

129.[4] The Court explained that the "Government's sweeping interpretation" of the statute "would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States.'" *Id.* at 132. The Court concluded that only "[i]f the evidence presented at trial was sufficient to establish that [the defendants] conspired to cause [the private company] to make misrepresentations to the [federal government]" could the conviction stand because only then would the United States itself have been the target of the fraud. *Id.*

The Sixth Circuit's conclusion that Sections 3729(a)(2) and (a)(3) do not require the submission of a false claim to the government cannot be reconciled with this Court's decision in *Tanner*. The Sixth Circuit's holding that the FCA encompasses "false claims made to parties other than the government so long as the claim will be paid with government funds" (Pet. App. 9a) rests upon reasoning that *Tanner* explicitly rejected: It "substitute[s] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government]'" in Sections 3729(a)(2) and (a)(3). *Tanner*, 483 U.S. at 132. The Sixth Circuit's rejection of a presentment requirement in Sections 3729(a)(2) and (a)(3) is therefore directly at odds with *Tanner*'s holding that a private entity's federally funded status does not transform it into the federal government for fraud purposes. *Id.* Indeed, this Court has repeatedly emphasized that

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[4] The statute provides that, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined" and/or imprisoned. 18 U.S.C. § 371.

"[g]rants of federal funds generally do not . . . serve to convert the acts of the recipient from private acts to governmental acts." *Forsham v. Harris*, 445 U.S. 169, 180 (1980); *see also United States v. Orleans*, 425 U.S. 807, 809 (1976) (holding that a nonprofit corporation that received all of its funding from the federal government was not a "federal instrumentality or agency for purposes of [the] Federal Tort Claims Act").

The conflict between the decision below and *Tanner* is especially stark with regard to Section 3729(a)(3) because the "conspire[s] . . . to defraud the United States" language at issue in *Tanner* is essentially identical to the "conspires to defraud the Government" language in Section 3729(a)(3). The Sixth Circuit's holding that a conspiracy to submit a false claim to a federally funded contractor constitutes a "conspir[acy] to defraud the Government," even where that false claim is never passed along to the government, is in direct tension with *Tanner*'s conclusion that a conspiracy to make a false statement to a federal grantee only amounts to a "conspir[acy] . . . to defraud the United States" where the defendants "conspired to cause [the private company] to make misrepresentations to the [federal government]"—that is, where the defendants conspired to cause the federal grantee to present the fraudulent statement to the government. 483 U.S. at 132.

This Court's review is therefore warranted for the additional reason that the Sixth Circuit's interpretation of Sections 3729(a)(2) and (a)(3) squarely

conflicts with this Court's reading of an indistinguishable fraud statute in *Tanner*.[5]

III. THE SIXTH CIRCUIT'S ERRONEOUS READING OF SECTIONS 3729(a)(2) AND (a)(3) RAISES ISSUES OF EXCEPTIONAL IMPORTANCE TO ALL GOVERNMENT CONTRACTORS.

The Sixth Circuit's decision not only deepens an existing circuit split and contravenes this Court's precedent, but it also disregards the plain language and legislative origins of Sections 3729(a)(2) and (a)(3). By casting aside the textual limitations on the FCA's scope, the Sixth Circuit's holding exposes subcontractors on federally funded contracts to onerous FCA liability in circumstances where Congress never intended the FCA to apply. It is critically important to all government contractors—as well as to many other recipients of federal funds—that this Court grant review in order to reestablish the textual bounds that Congress imposed on the FCA's reach.

A. The Sixth Circuit's holding that a claim need not be submitted to the federal government for liabil-

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[5] Moreover, although this Court has not previously had occasion to address whether Sections 3729(a)(2) and (a)(3) include a presentment requirement, the Court has emphasized in several FCA decisions that presentment was essential to the imposition of liability. *See United States v. Bornstein*, 423 U.S. 303, 311, 313 (1976) (holding that a subcontractor was liable for a separate statutory violation for each act that caused a prime contractor "to submit false claims to the Government," and explaining that the subcontractor was "liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) (holding that FCA liability attached where "[i]t was a prerequisite to respondents' payment by the local sponsors that . . . estimates be filed, transmitted to, and approved by, [federal agency] authorities").

ity to attach under Sections 3729(a)(2) and (a)(3) is directly at odds with the plain language of those provisions. Section 3729(a)(2) applies to anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). As the D.C. Circuit held in *Totten*, the "paid or approved by the Government" language unambiguously requires submission of a false claim to the government for payment or approval. 380 F.3d at 498. "Making false records or statements to get a false claim paid or approved by [a federally funded private company]," the D.C. Circuit correctly reasoned, "is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* (quoting 31 U.S.C. § 3729(a)(2)); *see also* Pet. App. 34a ("The term 'by the Government' is not the same as 'with government funds'") (Batchelder, J., dissenting).[6]

Indeed, if the phrase "claim paid or approved by the Government" in Section 3729(a)(2) actually meant "claim . . . paid with government funds," as the Sixth Circuit held (Pet. App. 9a), then the words "by the Government" would be utterly superfluous because the term "claim" is already defined to include requests for payment where "the United States provides any portion of the money." 31 U.S.C.

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[6] The Sixth Circuit's decision to reject a presentment requirement in favor of an inquiry into whether a federally funded private company made a payment "with government funds" (Pet. App. 9a) also has practical shortcomings because, "[w]hen federal and nonfederal funds have been commingled, it is difficult to prove whether specific . . . dollars from that account are federal or nonfederal." *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983) (per curiam).

§ 3729(c). The well-established canon against rendering any portion of a statute superfluous therefore indicates that a "claim paid or approved by the Government" must be something other than a "claim paid with government funds." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). As the D.C. Circuit concluded, that language requires submission of the claim to the government for payment or approval.

The structure of the FCA confirms this straightforward reading of the plain language of Section 3729(a)(2). The Sixth Circuit's conclusion that Section 3729(a)(2) does not include a presentment requirement effectively nullifies the presentment requirement that is indisputably included in Section 3729(a)(1). *See* Pet. App. 23a (acknowledging that Section 3729(a)(1) requires presentment). Sections 3729(a)(1) and (a)(2) impose partially overlapping prohibitions—"knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" and "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(1), (a)(2). If Section 3729(a)(2) did not require the submission of a claim to the federal government, then the presentment requirement of Section 3729(a)(1) would be rendered "largely meaningless" (*Totten*, 380 F.3d at 501) because plaintiffs would simply bring suit under Section 3729(a)(2) in order to evade that requirement. Under the Sixth Circuit's holding, "the plain language requirement in (a)(1) that claims be presented to an officer or employee of the Government would only trip up those foolish enough to rely on (a)(1) rather than (a)(2)."

Id. The D.C. Circuit's conclusion that both Sections 3729(a)(1) and (a)(2) require the submission of a false claim to the government ensures that the presentment requirement in Section 3729(a)(1) retains viability.[7]

The Sixth Circuit's interpretation of Section 3729(a)(3) is equally flawed. As an initial matter,

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[7] The Sixth Circuit's holding also disregards the legislative origins of Sections 3729(a)(2). Sections 3729(a)(1) and (a)(2) were originally part of one long sentence that imposed liability upon any person

> who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, . . . knowing such claim to be false, fictitious, or fraudulent; . . . [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of *such* claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry . . . .

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (emphasis added). As the D.C. Circuit explained in *Totten*, the predecessor language to Section 3729(a)(2) unambiguously included a presentment requirement because "the reference to 'such claim' was a shorthand reference to the claim already identified in the current subsection (a)(1)—that is, a claim that would be presented or caused to be presented to the United States." 380 F.3d at 500. The term "such" was removed from the statute in 1982 when Congress divided the single, lengthy sentence into the numbered sections of present-day Section 3729(a). Congress was clear, however, that the amendment "ma[de] no substantive change in the law." H.R. Rep. No. 97-651, at 3 (1982). Section 3729(a)(2) therefore preserved the presentment requirement that Congress established when it enacted the statute in 1863.

because Section 3729(a)(3) applies only to conspiracies to engage in the conduct prohibited by Sections 3729(a)(1) and (a)(2), *see, e.g.*, *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004), and both of those sections, properly construed, require presentment of a false claim to the government, a conspiracy is only actionable under Section 3729(a)(3) where the conspirators intended to submit a false claim to the government.

This conclusion is confirmed by the plain language of Section 3729(a)(3). This Court recognized in *Tanner* that a statute that applies to "conspir[acies] to defraud the Government" does not encompass conspiracies to defraud federally funded private entities, unless the object of the conspiracy was "to cause [the private company] to make misrepresentations to the" government by passing along the defendant's fraudulent statement to a government official. 483 U.S. at 132. As this Court admonished the government for doing in *Tanner*, the Sixth Circuit's reading of Section 3729(a)(3) would, "in effect, substitute[ ] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government].'" *Id.* Fidelity to Congress's intentions when enacting the FCA proscribes such efforts to rewrite the plain statutory language.

B. The Sixth Circuit's failure to adhere to the plain language, statutory structure, and legislative origins of the FCA will have profound consequences for the thousands of businesses that regularly perform subcontracting work on federally funded contracts.

Under the Sixth Circuit's expansive reading of Sections 3729(a)(2) and (a)(3), subcontractors are susceptible to the FCA's severe financial penalties—

fines of between $5,500 and $11,000 per false claim, plus treble damages—anytime they submit claims for payment to federally funded prime contractors or higher-tier subcontractors. *See* GAO Report 31 (indicating that the average recovery in an FCA action is more than $10 million). Accordingly, if the decision below is left undisturbed, every construction company hired as a subcontractor on a federal building, every accounting firm hired by a prime contractor to monitor the finances of a federal project, and every engineering firm hired to perform one of the hundreds of subcontracts relating to the construction of a naval vessel will be subject to FCA liability based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government. Such alleged fraud is properly addressed under state common-law causes of action, which provide adequate remedies for fraud perpetrated by one private party against another, rather than under the FCA, which is a specialized statute that addresses "fraud practiced on *the government*." *United States v. McNinch*, 356 U.S. 595, 599 (1958) (emphasis added); *cf. Metric Constructors, Inc. v. United States*, 314 F.3d 578, 581 (Fed. Cir. 2002) ("subcontractors in a government contract are not in privity with the government").

Indeed, the implications of the Sixth Circuit's decision extend well beyond subcontractors on government projects. The Sixth Circuit asserted that Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds." Pet. App. 9a. Under this expansive reading of the FCA, the statute would apply to *any* claim for payment submitted to *any* entity that receives federal funding and that uses at least a portion of that funding to

pay the claim. The D.C. Circuit recognized the implications of such reasoning in *Totten*, explaining that the absence of a presentment requirement "would make the potential reach of the [FCA] almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." 380 F.3d at 496; *cf. Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari") (Scalia, J., concurring in denial of certiorari).

This expansion of the FCA creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies. The possibility of abusive litigation is augmented by the fact that the civil penalties and treble-damages awards available in FCA suits impose tremendous settlement pressure upon even those companies that have meritorious defenses. Many companies simply cannot face the risk of going to trial and being assessed potentially bankrupting FCA liability, and are therefore compelled to accept settlements that provide undeserved windfalls to relators and their counsel.

This Court's review is necessary to restore the reasonable textual limitations that Congress placed on the FCA's scope and that the Sixth Circuit disregarded in the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner Southern Ohio Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING & KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner General Tool Company

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG & ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner General Motors Corporation

August 17, 2007

APPENDIX

APPENDIX A

UNITED STATES of America ex rel. Roger L. Sanders and Roger L. THACKER, Relators–Appellants,

v.

ALLISON ENGINE COMPANY, INC., General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Defendants–Appellees.

No. 05–3502.

United States Court of Appeals,

Sixth Circuit.

Argued: June 2, 2006.

Decided and Filed: Dec. 19, 2006.

ARGUED: James B. Helmer, Jr., Helmer, Martins, Rice & Popham, Cincinnati, Ohio, for Appellants. Glenn V. Whitaker, Vorys, Sater, Seymour & Pease, Cincinnati, Ohio, for Appellees. Steve Frank, United States Department of Justice, Washington, D.C., for Amici Curiae. **ON BRIEF:** James B. Helmer, Jr., Paul B. Martins, Robert M. Rice, Helmer, Martins, Rice & Popham, Cincinnati, Ohio, Scott A. Powell, Don McKenna, Hare, Wynn, Newell & Newton, Birmingham, Alabama, for Appellants. Glenn V. Whitaker, Victor A. Walton, Jr., Vorys, Sater, Seymour & Pease, Cincinnati, Ohio, for Appellees. Steve Frank, United States Department of Justice, Washington, D.C., Joseph E.B. White, Taxpayers Against

Fraud Education Fund, Washington, D.C., for Amici Curiae.

GIBBONS, J., delivered the opinion of the court, in which COOK, J., joined. BATCHELDER, J. (pp. 627–28), delivered a separate opinion concurring in part and dissenting in part.

GIBBONS, Circuit Judge.

This case is the consolidation of two False Claims Act suits alleging fraud in the negotiation and execution of subcontracts relating to the construction of United States Navy Arleigh Burke-class Guided Missile Destroyers. The destroyers are built primarily by two shipyards—Bath Iron Works ("Bath") and Ingalls Shipbuilding (collectively "the shipyards"). The construction involves hundreds of subcontracts for the components and parts that make up the ships, each of which costs approximately one billion dollars.

Each destroyer contains three generator sets ("Gen–Sets") that supply all of the electrical power for the ship. The shipyards contracted with defendant-appellee Allison Engine Company ("Allison"), which for a period of time relevant to this lawsuit was a division of defendant-appellee General Motors Corporation, to build approximately ninety Gen–Sets to be used in over fifty destroyers. Allison in turn subcontracted the assembly of each Gen–Set to defendant-appellee General Tool Company ("GTC"), which in turn subcontracted part of its work to defendant-appellee Southern Ohio Fabricators ("SOFCO"). Thus, the shipyards were the prime contractors (contracting directly with the Navy). Allison was a first-tier subcontractor. GTC was a second-tier subcontractor, and SOFCO was a third-tier subcontractor. Relators-appellants Roger L. Sanders and Roger L. Thacker ("relators") are former employ-

ees of GTC who worked on the Gen–Set assembly teams. Relators brought two separate *qui tam* actions under the False Claims Act ("FCA"), 31 U.S.C. § 3729, alleging fraud against Allison, General Motors, GTC and SOFCO (collectively "defendants") in connection with the construction of the Gen–Sets. *See id.* § 3730(b)(1).

The United States declined to intervene in the cases.[1]

The first action (referred to by the parties as the "Quality Case") alleges that the defendants submitted claims for payment despite knowing that the Gen–Sets did not conform to contract specifications or Navy regulations, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)-(3). The district court construed § 3729 to require a showing that a false claim had actually been presented to the United States government ("government") for liability to attach. Because relators made no such showing at trial, the court granted judgment as a matter of law to the defendants at the close of relators' case pursuant to Fed.R.Civ.P. 50(a). We can discern no presentment requirement in § 3729(a)(2) or (3), and reviewing *de novo*, *see Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595, 598 (6th Cir. 2001), we find this ruling to be in error and reverse. The second action (referred to by the parties as the "Pricing Case")

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[1] The statute governing *qui tam* actions under the False Claims Act allows the government to intervene in the district court and take over responsibility for conducting the litigation. *See* 31 U.S.C. § 3730(b)(2)-(4). In this case, although the government declined to intervene, it did appear as *amicus curiae* before this court in favor of relators in the Quality Case.

alleges that the subcontractors withheld cost or pricing data during negotiations with the government's agent in violation of the Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, and the FCA. The district court granted summary judgment to the defendants, finding that at the time of the negotiations, the defendants did not know for a fact that their costs would be reduced, and thus they had no obligation to disclose their mere hope or expectation that costs could be lowered. Again reviewing *de novo*, *see Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 657 (6th Cir. 2000), we agree and affirm.

I.

In the Quality Case, relators allege that the defendants knew of a number of defects in the construction of the Gen–Sets and knew that the defects constituted a violation of their respective contracts but nevertheless submitted invoices for payment.[2] As a result, these invoices constituted "false or fraudulent claims" that were paid with government funds in violation of the False Claims Act, 31 U.S.C. § 3729. *See United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998). Specifically, relators brought claims under § 3729(a)(1), (2), and (3).

The case was tried before a jury, and relators spent five weeks presenting evidence of the various defects. Relators introduced evidence that all of the

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[2] The exact defects are not relevant to this appeal but include the use of unqualified workers in constructing the Gen–Sets; faulty gearboxes in Gen–Sets that leaked oil, overheated and/or had defective temperature gauges; and the omission of final inspections required by military regulations.

money used to pay the relevant prime contracts and subcontracts, including all the money paid to the defendants, came from the government. Relators also introduced into evidence hundreds of invoices remitted for payment by the subcontractors (*i.e.*, Allison to the shipyards, GTC to Allison, and SOFCO to GTC). Relators did not, however, present any evidence that the subcontractors or the shipyards ever presented any false or fraudulent claim directly to the United States or the Navy for payment.[3] At the close of relators' case, defendants moved for judgment as a matter of law on the grounds that the lack of evidence of any false claim presented to the government meant that no reasonable jury could find a violation under the FCA. The district court accepted this argument and granted the motion. Relying on *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied* 544 U.S. 1032, 125 S.Ct. 2257, 161 L.Ed.2d 1059 (2005), the court held that liability under the FCA required a showing that a false or fraudulent claim was *presented to the government*, either by the defendants or by the prime contractor.

A.

The plain language of § 3729, the legislative history accompanying the most recent change to the statute, and the policy rationales behind the False Claims Act do not support the district court's reading of the statute. The FCA states in relevant part:

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[3] Counsel for relators admitted at the hearing on the Rule 50(a) motion, "[W]e haven't shown you Bath's invoices to the United States, and we're not going to show you those because they are totally irrelevant under the False Claims Act. . . ."

> Any person who:
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid[,]
>
> . . .
>
> . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

31 U.S.C. § 3729(a). Section (c) of the FCA sets forth the definition of a "claim":

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id. § 3729(c). The FCA was passed in 1863 in response to fraud perpetuated by defense contractors

during the Civil War. Originally, it contained both a criminal and a civil component; the criminal component has since been separated and codified in a different section of the United States Code. This case concerns only the civil portion of the FCA.

To determine the meaning of a statute, this court first looks to the language of the statute itself. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)); *Cox v. Mayer*, 332 F.3d 422, 424 (6th Cir. 2003). The plain language of the FCA states that actual presentment of a claim to the government is required under one, but not all, of the statute's sections. Only subsection (a)(1) of the statute makes any mention of presenting a claim to the government or Armed Forces. Subsections (a)(2) and (a)(3), which are separate bases for liability, contain no such presentment language. Subsection (a)(2) requires only that a defendant "make[ ]" or "use[ ]" a "false record or statement" in order to induce the government to pay or approve a claim. 31 U.S.C. § 3729(a)(2). Subsection (a)(3) requires a conspiracy to defraud the government to pay or allow a false claim. *Id.* § 3729(a)(3). The definition of "claim" in part (c) further supports the reading that presentment is not required under all sections of the statute. A claim is "*any* request or demand . . . for money or property which is made to a contractor . . . if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor . . . for any portion of the money or property which is requested or demanded." *Id.* § 3729(c) (emphasis added). The focus of this language is on the money paid out by the government in response to a false

statement or fraudulent request for payment. There is nothing in this language to suggest the claim must be shown to have been presented to the government, so long as it can be shown that the claim was paid with government funds.

The legislative history of the FCA solidifies this interpretation of the statutory language. The committee reports written when Congress restructured § 3729 in 1986, breaking section (a) into subsections and adding subsection (c), indicate that Congress intended to broaden the reach of the FCA to cover fraudulent claims submitted by subcontractors that result in loss to the government. The purpose of the 1986 change was "to enhance the Government's ability to recover losses sustained as a result of fraud . . . . " S. Rep. No. 99–435, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266. The Senate Report goes on to note that the amendment was "aimed at correcting restrictive interpretations of [the FCA]" by the courts "in order to make the [FCA] a more effective weapon against Government fraud." *Id.* at 5269. The Report clearly states that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 5274. "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.* at 5275. "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." *Id.* The House Report reached a similar conclusion: "[C]laims or false statements made to a party other than the Government are

covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99–660, at 21 (1986). There is no indication that a claim must be presented to the government in order to be actionable; the statute covers false claims made to parties other than the government so long as the claim will be paid with government funds.

These reports provide strong evidence that Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute. By rewording the statute and adding subsection (c), Congress accomplished this expansion, including making the FCA applicable to cases in which the government sustains a financial loss, regardless of whether the false claim is actually presented to the government. Reading a presentment requirement into subsections (a)(2) and (a)(3) is contrary to this purpose and contradicts the plain language of the statute.

B.

The district court, relying on the D.C. Circuit's decision in *Totten*, 380 F.3d 488, did just this. The issue in *Totten* was whether the submission of a false claim to Amtrak, which Amtrak paid with funds including federal grant money, violated the False Claims Act. The court, with a dissent by United States Circuit Judge Merrick Garland, held that it did not, because Amtrak was a federal grantee, not part of the government, and liability under the FCA is contingent upon a showing that the false claim was "presented to an officer or employee of the Government." 380 F.3d at 490. To reach this conclusion, the court first noted the

plain language of subsection (a)(1) requiring presentment to the government. *Id.* at 497. The court next held that subsection (a)(2) also contains a presentment requirement. Though the presentment language is not present in subsection (a)(2), the majority reasoned that because the two sections were previously part of the same clause, subsection (a)(2) must be read in conjunction with the presentment language in subsection (a)(1). *Id.* at 499–500. The court read the "by the Government" language in subsection (a)(2), which was added in 1986, as referring back to the presentment language in subsection (a)(1), *id.* at 499, despite the fact that these clauses are disjunctive and a litigant need only satisfy subsection (a)(1) *or (a)(2)* to prove an FCA claim. *See* 31 U.S.C. § 3729(a). The court also read this language as limiting the reach of section (c). *Totten,* 380 F.3d at 499. By adding the clause, the court reasoned, "Congress was reinforcing—rather than abandoning—the distinction between the Government and its grantees that might otherwise have been blurred by the addition of Section 3729(c)." *Id.* The court thus concluded that any claim brought under the FCA requires evidence that an actual claim was presented to the government before liability can attach. *Id.* at 502.

We disagree with the *Totten* court's interpretation of the FCA for several reasons. One, the plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented to the government to be actionable. Congress could have chosen to include the presentment language of subsection (a)(1) in other parts of the FCA and did not. The Supreme Court has consistently counseled against attributing the same

meaning to different language in the same statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("We refrain from concluding [ ] that the differing language in two subsections has the same meaning in each."). Moreover, reading presentment into subsection (a)(2) would give it almost the same meaning as subsection (a)(1), rendering the latter largely superfluous.[4] *See Totten*, 380 F.3d at 507

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[4] The dissent argues that this statement is incorrect because subsection (a)(1) "addresses false claims presented directly to the government, while Section (a)(2) addresses false claims submitted through a messenger, despite a lack of scienter on the part of the messenger." However, this reading of the statute overlooks the clear purposes of the two statutory sections. Subsection (a)(1) punishes an individual who "presents or causes to be presented" a false or fraudulent claim. This language addresses exactly the two scenarios posited by the dissent: *i.e.*, whether a party actually presents a false claim to the government or causes the presentation of that false claim through an intermediary, liability under subsection (a)(1) may attach.

Subsection (a)(2), on the other hand, punishes conduct comprising the transmission of false statements or records in order to obtain government payment or approval of a false claim. Requiring that these statements or records be submitted to the government directly would defeat the obvious purpose of the statute: reaching conduct that is independent of the submission of the false claim itself. Subsections

(Garland, J., dissenting). The "cardinal principle of statutory construction," however, is "to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett v. Spear,* 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal citations, quotations, and alterations omitted). The FCA cannot be read so as to make the meanings of subsections (a)(1) and (a)(2) indistinguishable.

The *Totten* majority reasons that the opposite reading—subsection (a)(2) does not have a presentment requirement—would make the presentment requirement in subsection (a)(1) "largely meaningless." *Totten,* 380 F.3d at 501. Why, the *Totten* majority asks, would any plaintiff bring a claim under subsection (a)(1) when she could just use the more lenient subsection (a)(2) for all claims? *Id.* The answer is that subsection (a)(2) contains its own more burdensome requirement—the claim must have actually been paid. This is not an element of all FCA actions. As the Supreme Court and other courts have held, an individual can be liable under the FCA for presenting a fraudulent claim to the government, even if the government discovers the fraud in time and does not actually pay out any money. *See Rex Trailer Co. v. United States,* 350 U.S. 148, 153 & n. 5, 76 S.Ct. 219, 100 L.Ed. 149 (1956); *United States v. Rivera,*

[Footnote continued from previous page]

(a)(1) and (a)(2) reach two distinct types of conduct, and there is no support for a reading of subsection (a)(2) (or (a)(3) for that matter) that imposes a presentation requirement in the absence of statutory language that would compel such a result.

55 F.3d 703, 709 (1st Cir. 1995).[5] These claims can be brought under § 3729(a)(1), which covers the presentment of a false or fraudulent claim to the

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[5] Referring to subsection (a)(2), the dissent observes that "[t]he majority cites no authority to support the proposition that this section requires that the claim has already been paid or that mere submission of a false claim is insufficient, and in fact cites authority to the contrary." The "authority to the contrary" to which the dissent refers consists of *Rex Trailer* and *Rivera*. To our knowledge, no authority exists either supporting the proposition that a claim must have been paid or approved to establish a violation of subsection (a)(2) or rejecting it. This is an issue of first impression, and our reading is based on the statutory language. Neither *Rex Trailer* nor *Rivera* addresses the question of the correct interpretation of subsection (a)(2). *Rex Trailer* pre-dates by some thirty years the current version of the FCA—the version that first separated subsections (a)(1) and (a)(2). We cite it for the point that an individual can be liable under the FCA even if the government does not pay out any money. That statement was correct in 1956 when *Rex Trailer* was decided and now. Our reliance on *Rex Trailer* relates to this general principle, not to the issue of whether a claim when the government does not pay or approve payment is now properly brought under subsection (a)(1) rather than subsection (a)(2). Similarly, *Rivera* reiterates the point made in *Rex Trailer* without any mention of subsections (a)(1) and (a)(2) or their language. In any event, the issue of whether an attempt to obtain payment or approval qualifies as a violation of subsection (a)(2) figures into the analysis only in assessing the soundness of the *Totten* majority's reasoning. The precise question before us is whether subsection (a)(2) requires presentment, not whether it requires payment. While we believe that consideration of the payment requirement is instructive, acceptance of the dissent's interpretation of subsection (a)(2) with regard to payment would not undermine the ultimate conclusion that subsection (a)(1) by its terms requires presentment, while subsection (a)(2) by its terms does not.

government or its agent *"for* payment or approval," regardless of whether the payment was actually made. Evidence that a claim was presented is necessary under this section because without it, there would be nothing to tie the claim to the government (as no government money was expended). In contrast, for liability to attach under subsection (a)(2), it is not sufficient to allege that the claim was merely submitted for payment. Rather, the claim must have been *"paid or approved"* by the government. Evidence that the claim has been "paid or approved" provides a sufficient link to the government; evidence that a claim was actually presented to the government is not necessary. *Cf. United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1003 (9th Cir. 2002) ("[The FCA] requires a real false claim, either in the form of the false claim itself or evidence sufficient to identify such a claim."). Subsection (a)(3) covers still different conduct—a conspiracy to defraud the government using false claims. Each subsection of § 3729(a) covers distinct conduct without reading language into the statute.

In holding that § 3729(a)(2) contains a presentment requirement, the *Totten* court answers a question it was not asked. The primary issue before the court was whether claims submitted to Amtrak, a federal grantee receiving a portion of its funds from the government, constituted presenting a claim "to the Government." 380 F.3d at 490. There is no discussion of what it means to "present" a claim, and it is unclear from the opinion whether any evidence was put forth, as it was in this case, that the money used to pay the defendants came from the government (rather than from non-government funds). *See id.* As the ma-

jority states, none of the parties argued that subsection (a)(2) provided separate grounds for relief during six years of litigation, and the majority would not have even considered the subsection (a)(2) argument had the dissent not raised it *sua sponte*. *Id.* at 497. The subsection (a)(2) analysis seems to be almost an afterthought—not so much a *ruling* on the meaning of subsection (a)(2) as a *response* to the arguments made by the dissent on an issue not raised by the parties. *Id.* at 498. In making this response, the majority seems to have misread the plain language of the statute and its legislative history.

C.

While the plain language of the statute and the legislative history provide a conclusive answer to the question before us, we also note that the narrow view of the FCA's scope taken by the *Totten* majority does not comport with the weight of authority interpreting the statute. The Supreme Court has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly. *See United States v. Neifert–White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541–42, 63 S.Ct. 379, 87 L.Ed. 443 (1943). The purpose of the FCA is to "protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." *Neifert–White*, 390 U.S. at 233, 88 S.Ct. 959 (quoting *Rainwater v. United States*, 356 U.S. 590, 592, 78 S.Ct. 946, 2 L.Ed.2d 996 (1958)). Thus, the FCA covers all claims to government money, even if the claimant does not have a direct connection to the government. For instance, in *Marcus*, the

Court held that a collusive bidding process by contractors employed by a local government to work on Public Works Administration projects could give rise to a claim under the FCA. 317 U.S. at 543, 63 S.Ct. 379. Although the workers contracted with the local government rather than the United States and were paid by the local authorities, the fact that the funds for the project derived from the federally-funded Federal Public Works Administration meant that the FCA applied. The Court focused on the federal money being used to pay the fraudulent claims rather than the presence of a local intermediary. *Id.* at 544, 63 S.Ct. 379. Although the Court did not address the issue of whether the claim had to be presented to the government, this case is an early indication that the FCA should be construed broadly.

The Court reaffirmed this position in *Neifert-White,* when it held that a "claim" does not merely encompass a claim for payment, but can also include an application for a loan of federal money. 390 U.S. at 231–32, 88 S.Ct. 959. Noting that the case "involves a false statement made with the purpose and effect of inducing the Government immediately to part with money," the Court ruled that the definition of "claim" within the FCA cannot be so narrowly defined. *Id.* at 232, 88 S.Ct. 959. "This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233, 88 S.Ct. 959.

A number of courts, including this circuit, have followed the Supreme Court's lead in avoiding an overly-narrow construction of the FCA. *See United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.,* 400 F.3d 428, 445 (6th Cir.

2005) (establishing a broad test for whether a claim is "material" under the FCA). Citing *Marcus* and *Neifert-White,* the Fourth Circuit set forth a test for FCA liability contrary to the one established in *Totten. Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 788 (4th Cir. 1999). After noting that the FCA should be broadly construed, *id.* at 786, the court held that "any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." *Id.* at 788. The court set out a four-factor test: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or forfeit moneys due (i.e., that involved a 'claim')." *Id.* So long as it can be shown that the government paid out money in response to a claim, no evidence is needed under this test that a claim was presented to the government. This test appears to more accurately reflect the view of the FCA taken by the Supreme Court and Congress.

Other courts, while not directly ruling on the presentment issue, have also broadly construed the FCA. The First Circuit has held that liability under the FCA turns not on whether money was paid out, but on whether "the [false] statement has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment." *Rivera,* 55 F.3d at 709–10.[6] The Ninth Circuit

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[6] Contrary to the district court's opinion and defendants' argument, Rivera does not stand for the proposition that a claim

has also taken a broad view of the FCA, stating that a plaintiff does not even have to bring forth evidence of a false claim, so long as she presents "evidence sufficient to identify such a claim." *Kitsap*, 314 F.3d at 1003. The Third Circuit has come the closest to holding that presentment is not required under the statute. In *United States v. Lagerbusch*, the court upheld a finding of liability under the FCA for claims submitted to a private corporation that received funding from the government. 361 F.2d 449, 449 (3d Cir. 1966). The key issue for the court was that the funds used to pay the claimant originated with the government. *Id.* This alone was sufficient to find liability under the FCA. *Id.* at 449 ("We have no doubt that the False Claims Act covers such an indirect mulcting of the government."). *See also United States ex rel. Luther v. Consol. Indus., Inc.*, 720 F. Supp. 919, 921–22 (N.D. Ala. 1989) (holding that the FCA applies when a claim is presented not to the government, but to a government contractor, so long as "payment of the claim would ultimately result in a loss to the United States").

Turning to the precise issue in this case, the cases cited by the district court and defendants do not support a reading of the FCA to require presentment of a claim to the government. Several

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must be presented to the government in order to be actionable. The court did not address this issue, as the claim at issue in Rivera was presented to the government. 55 F.3d at 710. Moreover, as discussed above, in order to prove a case under the FCA when no money is paid out, it is necessary to show that a claim was presented.

discuss the necessity of showing that a "false claim" be made but do not speak as to whether such a claim must be presented to the government. *See Rivera,* 55 F.3d at 709–10; *United States ex rel. Schmidt v. Zimmer, Inc.,* 386 F.3d 235, 243–44 (3d Cir. 2004); *United States ex rel. Quinn v. Omnicare, Inc.,* 382 F.3d 432, 438–39 (3d Cir. 2004); *Costner v. URS Consultants, Inc.,* 153 F.3d 667, 677 (8th Cir. 1998) (distinguishing between claims made against government funds and claims made against private funds). Other cited cases specifically contradict the defendants' argument by stating or implying that presentment to the government is not required. *See United States v. Southland Mgmt. Corp.,* 326 F.3d 669, 674 (5th Cir. 2003) (defining a claim as a request for money "which is made to someone—including the government itself—who will at least in part use government money or property to pay it"); *Harrison,* 176 F.3d at 788; *Kitsap,* 314 F.3d at 1003.

In addition to *Totten,* defendants primarily rely on a group of cases dealing with the pleading requirements of Fed. R. Civ. P. 9(b) in the context of actions under the FCA. These cases provide only minimal support for reading a presentment requirement into all parts of the FCA. In *United States ex rel. Clausen v. Lab. Corp. of Am.,* the Eleventh Circuit held that the plaintiff must allege the presentment of "an actual false claim for payment" to the government in order to satisfy Rule 9(b)'s heightened pleading requirement. 290 F.3d 1301, 1311 (11th Cir. 2002). The court reasoned that the submission of a claim is the *"sine qua non"* of the FCA; thus, there is no actionable damage absent evidence of presentment. *Id.* The court, however, did not distinguish among sub-

sections of the statute or analyze its language. *See also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232–34 (1st Cir. 2004) (relying on *Clausen* to reach a similar conclusion but likewise not engaging in statutory interpretation of the FCA). Further, the two cases on which the *Clausen* court relies—*Harrison*, 176 F.3d 776, and *Rivera*, 55 F.3d 703—are read out of context and do not support the holding of the case.

This court relied partially on *Clausen* in finding an FCA complaint insufficient under Rule 9(b). *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 564 (6th Cir. 2003). The *Yuhasz* court, however, did not read a presentment requirement into the FCA. Rather, the complaint in that case was deemed insufficient because it could not identify any specific parties or specific fraudulent acts that supposedly violated the FCA. *Id.* at 563–64. Although *Yuhasz* quotes cases that imply that a presentment requirement exists in the FCA, the opinion contains no holding or other language that would bind us in this case.

Defendants also suggest that two cases involving the statute of limitations for FCA actions imply a presentment requirement. In the first, this court ruled that the limitations period did not commence "until the first voucher seeking payment of false claims was presented to the United States." *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir. 1962). In the second, the First Circuit stated that because the FCA "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment,'" the date of such a claim was definitive in determining the accrual of the limitations period. *Rivera*, 55 F.3d at 709. In neither case, however, did the court squarely address the issue of whether

presentment was required, and, in any event, both courts analyzed the version of the FCA in effect prior to the 1986 amendments. Moreover, neither of the cases stated that the presentment of a claim was the *only* act that could commence the limitations period; rather, in the factual situations encountered by those courts, it was the presentment of a claim that started the clock.

At most, the cases cited by the defendants imply that the FCA contains a presentment requirement. None of the cases, however, address the precise issue before this court, and we find them unpersuasive in the present case.

D.

The dissent faults our analysis of the statutory language first by reading subsection (a)(2) as creating a causal connection between the claim and the payment and then by concluding that payment of a claim by the government presupposes that the claim has been presented to the government. We agree that the statute requires a causal connection between the making or use of a false statement and the government's payment or approval of the claim. This causal connection requirement arises from use of the word "get." The false statement's use must result in obtaining or getting payment or approval of the claim. We disagree however that the causal connection requirement suggests that presentment to the government is required under subsection (a)(2) as a matter of law. The elements of subsection (a)(2) can be met without presentment to the government.

In the dissent's own first example of a prime contractor and sub-contractor, if the subcontractor submits a false bill to the prime contractor which the prime contractor uses to obtain payment of a presented claim (which would itself be false by virtue of the false bill included in it), the subcontractor can be liable under either subsection (a)(1) or (a)(2). To impose liability on the sub-contractor under subsection (a)(1), the government would have to prove that the sub-contractor caused presentment by the prime contractor. For liability of the subcontractor under subsection (a)(2), the government could omit the proof of presentment but would have to present sufficient evidence from which the trier of fact could conclude that the subcontractor's use of the false statement resulted in the payment of the claim by the government. The dissent's second example in which the government bankrolls the prime contractor may well present a situation in which the government is unable to establish the required causal connection because it cannot prove presentment. But that inability to prove a particular type of claim factually without proof of presentment does not mean that as a matter of law presentment is required as an element of all claims under subsection (a)(2). And in the second example, the payment with government funds (although already in the hands of the prime contractor) might permit the inference that the claim had been paid by the government; the flaw in the case would be the omission of the proof of causal connection, *i.e.*, a showing that the false statement was used "to get" the claim paid.

The dissent has essentially characterized what we see as a problem of adequacy of proof in various hypothetical contexts as a question of statutory

interpretation. We prefer to accord the statute the meaning expressed by its clear language and to leave the thorny problems of whether a relator has presented sufficient proof of causal connection for resolution in the context of future cases, based on the factual record in those cases. Our analysis of the statutory construction issue can and should end with a determination that presentment is not required as a matter of law to establish a violation of subsection (a)(2) or (a)(3).

E.

The plain language of the statute, the legislative history, and the decisions of the Supreme Court and other courts lead us to conclude that the district court and the *Totten* court erred in reading a presentment requirement into all subsections of the False Claims Act. We hold that while liability under § 3729(a)(1) turns on whether a claim has been presented to the government, subsections (a)(2) and (a)(3) do not require such a showing. Rather, a relator under these two subsections must show that government money was used to pay the false or fraudulent claim. This requirement comports with the policy rationale behind the FCA—protecting the government fisc—while ensuring that the statute applies only to claims submitted to the government and not to private entities.

We note that there will doubtless be cases pursued under subsections (a)(2) and (a)(3) where relators choose to introduce evidence that false claims were presented to the government. Evidence of presentment of a false claim is highly relevant to establishing the requisite intent under subsections (a)(2) and (a)(3). Moreover, claims under subsections (a)(2) and (a)(3) which involve requests

for payment by prime contractors rather than subcontractors may perhaps be more easily proved by showing presentment of a false claim to the government. Thus, evidence of presentment may have practical importance in claims under subsections (a)(2) and (a)(3). Our ruling here determines only that presentment evidence is not required for subsection (a)(2) and (a)(3) claims as a matter of law.

Having found that the district court erred in interpreting subsections (a)(2) and (a)(3), we turn to consideration of whether relators presented sufficient proof to avoid judgment as a matter of law. Having reviewed the evidence, a reasonable jury could find for relators despite the lack of evidence of presentment to the government. During trial, relators put forth evidence that all of the money paid to the defendants came from the United States government. Chris Krohne, a program manager at Allison, testified that all of the money for the project "flows from the taxpayers to the Congress to the Department of Navy to Bath, then [to Allison]." He clarified that all of the money paid to Allison, GTC, and SOFCO came from the United States government. Relators also produced the invoices submitted for payment by Allison, GTC, and SOFCO and put forth evidence of knowledge on the part of the contractors that the Gen–Sets did not conform to Navy regulations and that the invoices were paid using government funds. If accepted by a jury, this evidence is sufficient to find that the defendants used a "false record or statement to get a false or fraudulent claim paid by the Government" and/or "conspire[d] to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C.

§ 3729(a)(2), (3). The jury should have been allowed to decide whether the subcontractors violated subsections (a)(2) and/or (a)(3) by submitting these invoices. The district court erred in granting judgment as a matter of law.[7]

II.

The Pricing Case stems from a redesign of the Gen–Sets in the early 1990s. Although some confusion exists as to who initiated the discussions, the parties agree that the Navy, the shipyards, and Allison wanted to redesign the Gen–Sets to improve maintenance and increase reliability. The issue in the case is whether Allison and GTC failed to disclose pertinent "cost and pricing data" relating to anticipated cost decreases with Bath and the Navy during the negotiation of the redesign.[8] Any such omission would violate the Truth in

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[7] The defendants argue in the alternative that the decision of the district court should be affirmed because relators have not shown that any false claims materially affected the government's decision to pay the false claim. Materiality is an element of an FCA claim, *see A+ Homecare,* 400 F.3d at 442, but requires only a showing that any false or fraudulent claim "had the natural tendency to influence or was capable of influencing the government's funding decision." *Id.* at 446 (internal quotation and citation omitted). Relators have satisfied this lenient test. A reasonable jury could easily find that the government's funding decision could have been influenced by the defendants' fraudulent claims that the Gen–Sets complied with Navy specifications. Thus, defendants' alternative argument fails.

[8] The Pricing Case deals only with the contract between Allison and Bath. GTC is also alleged to have covered up its negotiations with Allison. No allegations are made that SOFCO acted improperly in the Pricing Case.

Negotiations Act, 10 U.S.C. § 2306a, and because Allison and GTC submitted claims for payment despite knowledge of their non-compliance with all contractual provisions and applicable statutes (including TINA), a cause of action would exist under the False Claims Act. *See Compton,* 142 F.3d at 304.

A.

The facts of the Pricing Case are as follows. In June 1992, a meeting was held to discuss "possible alternatives" for redesigning the existing AG9130 Gen–Sets. The Navy was concerned about the problems with the AG9130 Gen–Sets and wanted Allison "to do it right this time." After this meeting, Allison began developing a conceptual redesign, which would be model AG9140. In July 1992, GTC informed Allison that after reviewing the preliminary drawings, GTC "does not anticipate any circumstances which would necessitate a request for an increase in the negotiated price . . . . " In the fall of 1992, Allison began constructing a mock-up of the AG9140 to present to the Navy and the shipyards. In December, Allison's program manager summarized a site visit and meeting with Navy and Bath personnel regarding the redesign ("December 1992 memo"). The memo states that the contract modifications will be "no cost" and that the price paid by Bath for each Gen–Set will not increase. The memo also outlined a "long term strategy to reduce the cost of the generator set."

> This reduction will result as the redesign eliminates many parts. We need this reduction to make us more competitive on new programs. Eventually, we are obligated to identify the cost impact of the redesign.

> Most of the impact is to General Tool. We need to have GTC closely account for hours and material in the first unit of the redesign. After we have built some of the redesign units, we can recalculate our costs with very low risk. Given our current loss situation on the program, I feel we can negotiate a greater percentage profit when we calculate the ECP. We offer the Navy a cost reduction but keep out profit the same as it is now.

The new AG9140 design was approved at a January 1993 design review. At that point, the Navy requested that the first AG9140 Gen–Set be delivered in April 1994 and that the redesign be a "no-cost" change (i.e., no price increase). In the spring of 1993, Allison met with GTC, and GTC agreed to accept the no-cost modification. Allison then issued an experimental procurement authority form ("EPA Form") requesting a purchase order be issued to GTC for three Gen–Sets. The request stated that the change to the AG9140 design "shall not result in a price increase. A price reduction is anticipated subject to negotiation prior to completion of the order."

In May 1993, Allison submitted its formal Engineering Change Proposal ("ECP") for the AG9140 redesign. The ECP again stated that this is a "no cost" change and that "[t]he recurring costs of the AG9140 remain unchanged from those of the AG9130." It is important to note that for the purposes of the ECP, "cost" is defined as "cost to the Government." *See* U.S. Dep't of Defense, Configuration Control—Engineering Changes, Deviations and Waivers, DOD–STD–480A, ¶ 110.14 (April 12, 1978). In June 1993, Allison submitted an

amendment to its purchase order with GTC, formally changing the order to model AG9140 ("June 1993 Purchase Order Amendment"). The document also states, "A price reduction is anticipated. This reduction is subject to negotiation once redesign is finalized and prior to completion of order."

On behalf of the Navy, Bath proceeded to negotiate a price for the proposed ECP. The two parties reached an agreement in November 1993 that the price for the AG9140 model would remain the same as for the AG9130 model. At this time, Allison and GTC had not reached any agreement (or even begun negotiations) on a price for the assembly of the redesigned Gen–Sets. Such an agreement was not reached until December 1994, when the two parties contracted to reduce the amount paid by Allison to GTC by $74,000 per unit. Allison never specifically informed the Navy of these savings, although it did inform Bath in both 1995 and 1996 that "[m]anufacturing cost at General Tool is less" for the new design. Along with this statement, Allison averred that "other areas such as engineering, technical publications, and product support are over the original budgets. Without a new proposal, the net value of these changes is not known." Neither the Navy nor Bath requested a complete proposal, including cost information, from Allison, because it would have taken months to complete and would have delayed construction of the destroyers. Allison fully divulged its new agreement with GTC when it renegotiated its full contract with Bath in late 1996.

The parties cross-moved for summary judgment on the issue of whether the defendants' failure to disclose its plans to lower its costs for the Gen–Sets violated TINA. Disagreeing with the magis-

trate judge's recommendations, the district court denied summary judgment to relators and granted the defendants' motions for summary judgment. In ruling for the defendants, the court found that Allison did not make a false claim in the May 1993 ECP because "cost" is unambiguously defined as "cost to the government." The court also held that Allison had no duty to disclose its plans to lower costs on the AG9140 because any such ideas were merely speculative during the 1993 negotiations with Bath. Thus, Allison did not withhold any "facts" from the government. By the time Allison knew for a fact that its costs would be lower—when it reached its agreement with GTC—thirteen months had passed since the contract with Bath had been finalized and Allison no longer had a duty to disclose the lower costs.

B.

We agree with the district court. TINA requires subcontractors to make available "cost or pricing data" prior to "the pricing of a change or modification to the subcontract" if the "price adjustment is expected to exceed $100,000." 10 U.S.C. § 2306a(a)(1)(D)(i). Allison and GTC did not violate TINA because (1) they had only preliminary plans to negotiate a lower price for the Gen–Sets and had not actually reached an agreement to lower the price by November 1993—the time Allison and Bath reached their agreement; and (2) they had no duty to disclose their agreement that did lower the price because it was made thirteen months after November 1993. As we find that Allison and GTC did not withhold any "cost or pricing data" from Bath during the contract negotiations, we need not consider whether the $100,000 threshold was met in this case.

"Cost or pricing data" under TINA includes "all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly." 10 U.S.C. § 2306a(h)(1). Judgments need not be disclosed, but a party must make available "all factual information on which a judgment was derived." *Id.* Thus, any factual information known to Allison prior to November 23, 1993, that "a prudent buyer or seller would reasonably expect to affect price negotiations significantly" should have been disclosed to Bath.

Relators argue that Allison had a duty to disclose the "fact" that it had an "agreement to negotiate a price reduction" with GTC prior to November 1993. If such an agreement had existed, it would likely be a "fact" that one "would reasonably expect to affect price negotiations significantly." The evidence to support this purported agreement, however, is lacking. Two of the documents put forth by relators do not even insinuate that a price reduction will occur, much less prove that an agreement to negotiate one has been reached. The first, a letter from GTC to Allison on July 31, 1992, states only that GTC anticipates no increase in cost from the redesign. The second, an Allison memo dated May 4, 1993, deals primarily with GTC's acceptance of the no-cost modification and that the AG9140 will have "less material cost" than the AG9130. These documents do not discuss price or the Allison–GTC agreement in any way.

Relators also rely on the December 1992 memo, the EPA Form and the June 1993 Purchase Order Amendment. These documents give some indication that a price reduction will occur but offer no evidence

that an agreement has been reached to do so. The December 1992 memo states only that "[o]ur long term *strategy* is to reduce the cost of the generator set" before providing one estimate of how costs could be reduced. Both the EPA Form and the June 1993 Purchase Order Amendment state that a price reduction is "anticipated" but that such a reduction is "subject to negotiation." None of these documents gives any indication that an agreement has been reached with GTC to negotiate any price change, much less a lower price.[9] Relators have put forth no document from GTC stating that the company agreed to renegotiate or agreed to lower its price. Rather, these documents appear to represent Allison's unilateral belief that it should pay a lower price for GTC's services going forward.

Allison did not have a duty to relay its expectation or hope that it would have lower costs to Bath during the contract negotiations. The only thing that Allison knew as a fact prior to November 1993 was that it *wanted* to negotiate a lower price. There is no evidence that GTC would even agree to such a renegotiation or how much Allison could save in the renegotiation. The two sides did not begin negotiations until the first Gen–Sets had been constructed, a year after the contract with Bath had been finalized. At this point, Allison had no duty to disclose under TINA be-

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[9] Relators refer to the June 1993 Purchase Order Amendment as a "contract amendment," but there is no indication that this is any more than a reaffirmation that GTC should deliver AG9140's rather than AG9130's.

cause the negotiations with Bath were complete and a "price adjustment" was not "expected."

The cases cited by relators do not alter our analysis. In *Aerojet Solid Propulsion Co. v. White,* 291 F.3d 1328 (Fed. Cir. 2002), the contractor failed to disclose to the Air Force that it had solicited sealed bids from a potential supplier during the final stages of the two parties' price negotiations. Aerojet argued that possession of the bids was not "cost or pricing data" because it had not opened the sealed bids and thus did not know the amounts of the bids. The court rejected this argument, ruling that "cost or pricing data is not any less cost and pricing data because it has been selectively disseminated or not actually used." *Id.* at 1332. Unlike the contractor in *Aerojet,* Allison did not have concrete information in its possession during its negotiations with Bath. Allison did not choose to keep itself ignorant from new cost data; it had no new data. Allison had only a hope that the price it paid GTC would decrease. In *Cutler–Hammer, Inc. v. United States,* 189 Ct.Cl. 76, 416 F.2d 1306 (1969), the court found a TINA violation because the contractor knew the exact amount of the lower bid, and the court found there was a "definite possibility" that such a bid would be accepted. *Id.* at 1314. Again, however, Allison did not possess such definite information. Finally, the court in *United States ex rel. Campbell v. Lockheed Martin Corp.,* 282 F.Supp.2d 1324 (M.D. Fla. 2003), ruled that preliminary findings made by a contractor must be reported because they are still findings and could influence the outcome of the negotiations. *Id.* at 1334–35. No findings, preliminary or otherwise, existed in the present case. Allison merely speculated that it would be able to

lower costs, and we will not extend TINA to require the disclosure of every cost projection or forecast memo.

A primary objective of TINA is to put the government and contractors on roughly equal footing during price negotiations. *See Aerojet,* 291 F.3d at 1330 (citing *Unisys Corp. v. United States,* 888 F.2d 841, 844 (Fed. Cir. 1989)). Allison's failure to disclose its plan to lower its own costs did not put the government at an unfair disadvantage in the negotiations because the plan has not been shown to be anything more than pure speculation as of November 1993. As relators have put forth no additional evidence of any "cost or pricing data" possessed by Allison that was not furnished to Bath or the government, summary judgment is appropriate.

III.

The decision of the district court in the Quality Case is REVERSED and the case is REMANDED for proceedings not inconsistent with this opinion. The decision of the district court in the Pricing Case is AFFIRMED.

BATCHELDER, Circuit Judge, Concurring in part and Dissenting in part.

CONCURRING IN PART, DISSENTING IN PART

I respectfully dissent from that portion of the majority opinion reversing the district court's judgment in favor of the defendants in the "Quality Case." I cannot agree with the majority's interpretation of 31 U.S.C. § 3729(a)(2), which states in pertinent part: "Any person who . . . knowingly makes, uses or causes to be made or used, a false

record or statement to get a false or fraudulent claim paid or approved by the Government . . . ." The majority asserts that "There is nothing in this language to suggest that the claim must be shown to have been presented to the government, so long as it can be shown that the claim was paid with government funds." I would read the term "[a] claim paid or approved by the Government" as creating a causal connection between the claim and the payment. Payment of a claim "by the Government" presupposes that the claim has been presented to the government as a request for that payment. The term "by the Government" is not the same as "with government funds." The former connotes action; the latter mere association.

Consider a case in which the government contracts for a specific project with a prime contractor, which in turn contracts with a sub-contractor. In the ordinary course, the government pays the prime contractor in response to the bills submitted by the prime contractor. Those bills will include the bills submitted to the prime by the sub-contractor. So when a sub-contractor submits a false statement to the prime contractor, it is using that false statement to get its fraudulent claim paid by the government, albeit through the prime contractor. And the prime contractor is not merely paying the sub with government funds; rather, the prime contractor uses the sub's claim to induce the government to pay the prime contractor's bill, which includes the false claim. Critically, the government determines whether to approve or deny the payment, or to provide or withhold the funds. Alternatively, suppose the prime contractor has been bankrolled by the government and given full authority

to pay claims without resort to government approval. The subcontractor's claim is actually paid "by the prime contractor," albeit with government funds. But, in bankrolling the prime contractor, the government did not act in response to the claim. The government may not even know that the subcontractor made a claim. The subcontractor's false statement did not induce the government to do anything. For purposes of inducing a response, presentment of the claim to the government is necessary to initiate a causal relationship that is completed with an act (payment or approval) "by the Government."

This distinction was explained—correctly, in my view—in *Totten v. Bombardier Corporation,* 380 F.3d 488, 497–502 (D.C. Cir. 2004). In *Totten,* the claimant submitted the false claim to Amtrak, a non-governmental entity. *Id.* at 498–99. Amtrak was not an intermediary—Amtrak was bankrolled by the government, but had autonomy to pay whatever claims it liked without government involvement or approval. The *Totten* majority explained that, even though Amtrak had federal funds to spend, Amtrak's independence meant that the claim was paid by Amtrak, not "by the Government." *Id.* at 502. The "government funds" nexus is too broad to survive the limiting language of "by the Government." *See id.* at 496 (warning that such a "boundless" interpretation would include almost every college and university, due to federal grants).

As the above example should make evident, I also disagree with the majority's statement that "reading presentment into (a)(2) would give it almost the same meaning as section (a)(1), rendering the latter largely superfluous." Section (a)(1) addresses false claims presented directly to the gov-

ernment, while Section (a)(2) addresses false claims submitted through a messenger, despite a lack of scienter on the part of the messenger. Section (a)(3) addresses conspiracy, but I believe the previous analysis would apply as well to its particular language, which also creates an implicit causal connection between the claim and the government payment.

Finally, I disagree with the majority's proposition that, under Section (a)(2), "the claim must have actually been paid." To begin with, the plain language of Section (a)(2) applies to one who "knowingly mak*es*, us*es* or caus*es* to be made or used, a false record or statement." All of those verbs are in the present tense. Section (a)(2)'s infinitive phrase "to get a . . . claim paid" is simply an adverbial phrase modifying those verbs. That phrase explains the motive or reason for the making, using, or causing, and an ordinary reading of this language reasonably encompasses even an *attempt* to get a claim paid. The majority cites no authority to support the proposition that this section requires that the claim has already been paid or that mere submission of a false claim is insufficient, and in fact cites authority to the contrary. *See, e.g., Rex Trailer Co. v. United States,* 350 U.S. 148, 153 & n. 5, 76 S.Ct. 219, 100 L.Ed. 149 (1956); *United States v. Rivera,* 55 F.3d 703, 709 (1st Cir. 1995) ("Indeed, a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss.").

I would find the present case subject to the *Totten* distinction discussed above. If payment of the fraudulent claim was made by the shipyards (i.e., prime contractors) rather than "by the Gov-

ernment," then Section (a)(2) imposes no liability. *See Totten,* 380 F.3d at 502; 31 U.S.C. § 3729(a)(2). As the district court found, and the majority quotes in footnote 3, the plaintiffs not only failed but actually refused to produce any evidence that any claim was presented by the shipyards to the government for payment. Without evidence that the government was ever requested to pay the claim, there is no basis to conclude that the government actually decided the claim one way or the other, or ever approved payment. As with Amtrak, payment by the shipyard, even using government funds, is not the same as payment "by the Government." Therefore, I must also disagree with the majority's conclusion in footnote 5. I would find that the plaintiffs failed to prove the causal connection necessary to demonstrate their prima facie case, and affirm the district court's grant of judgment as a matter of law.

I concur in the remainder of the opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA ex rel. ROGER L. SANDERS, et al.,

Plaintiffs,

-vs- **Case No. 1-:95-CV-970**

ALLISON ENGINE COMPANY, et al.,

Judge Thomas M. Rose

Defendants.

ENTRY AND ORDER GRANTING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO ALL FALSE CLAIMS ACT COUNTS (Doc. #669); FINDING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON RELATORS' DAMAGE ALLEGATIONS

MOOT (Doc. #670); FINDING DEFENDANTS' ORAL MOTION FOR JUDGMENT AS A MATTER OF LAW WITH REGARD TO PARAGRAPHS 159 TO 161 MOOT; OVERRULING DEFENDANT GENERAL TOOL COMPANY'S ORAL MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING RELATORS' RETALIATION CLAIMS; FINDING RELATORS' MOTION FOR RULE 54(b) CERTIFICATION MOOT (Doc. #472) AND TERMINATING THIS CASE

The Defendants made several motions for judgment as a matter of law after the Relators rested their case. These motions were made pursuant to Rule 50(a) of the Federal Rules of Civil Procedure.

The Defendants moved for judgment as a matter of law on all false claims counts, on Relators damage allegations, on Roger Sanders' retaliation allegations and on certain paragraphs in Relators' Second Amended Complaint. The motion on "all false claims counts" is in regard to a requirement that a false claim be submitted to the government and is in regard to the materiality of the claims presented by the Relators.

The Motions were initially made and briefed by all Parties on the record on March 4, 2005. Subsequently, the Defendants filed written briefs on the false claims counts (Doc. #669) and damages (Doc. #670) motions. The Relators responded in writing to the false claims motion. (Doc. #673) and the Defendants replied (Doc. #674). Following further oral briefing on the record on March 7, 2005, the Defendants filed a supplemental reply. (Doc. #675.)

The Motions were fully briefed and the Court entered its opinion in summary fashion on the record on March 7, 2005, so that the Trial could proceed. This Entry more fully sets forth the Court's opinion.

The branch of the Motion on the false claims act counts that challenges whether evidence was presented that a false claim was submitted to the Government is dispositive of a significant portion of the Relators' Second Amended Complaint. Therefore, it will be addressed first herein.

THE PRESENTATION OF A FALSE CLAIM TO THE GOVERNMENT

The Defendants argue that the Relators are required by the False Claims Act (the "FCA") to show that a false or fraudulent claim was submitted by Bath or Ingalls to the Government and that the Relators have not presented evidence of such. Bath and Ingalls were the prime contractors in this case who had contracts directly with the government. The Defendants in this case were subcontractors to Bath and Ingalls.

Relators first argued that they need not present invoices from Bath to the Government because the invoices are "totally irrelevant." They are irrelevant, according to the Relators, because the Court should focus, not upon the claim being presented to the United States, but upon the claims being made under the contracts involving the subcontractors who are the Defendants in this case. In other words, the Relators first argued that they do not have to show that there was a false claim submitted to the Government. They only have to show that Government money was eventually used to pay the subcontractors who submitted allegedly false claims.

Relators later argued that there was evidence presented to the jury that a false or fraudulent claim had been submitted to the Government by Bath. This argument was based upon an "implied certification" theory of liability.

Defendants' Rule 50(a) Motion regarding the presentation of a false claim to the Government centers upon certain sections and subsections of the FCA. Those relevant sections and subsections will first be set forth followed by an analysis of Defendants' Motion.

RELEVANT SECTIONS OF THE FCA

Section 3729(a) of the FCA provides that,

> Any person who - -
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
>
> ...
>
> is liable to the United States Government for a civil penalty ...

Section 3729(c) of the FCA provides that,

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property

> which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Having set forth the relevant sections and subsections of the FCA, the analysis turns to the Defendants' Rule 50(a) Motion regarding the presentation of a false claim to the Government.

ANALYSIS OF THE MOTION REGARDING THE PRESENTATION OF A FALSE CLAIM

The Defendants argue and the Relators agree that liability under Section 3729(a)(1) ("subsection (a)(1)") requires proof that a false or fraudulent claim has been submitted "to an officer or employee of the United States Government or a member of the Armed Forces of the United States." However, the Parties disagree with regard to whether Section 3729(a)(2) ("subsection (a)(2)") requires proof that a false or fraudulent claim has been submitted to the Government. The Defendants argue that liability under subsection (a)(2) requires proof that a false or fraudulent claim has been submitted to the Government and the Relators argue that it does not.

Current Caselaw

At least nine Federal Circuit Courts have determined that a defendant must, in claims based upon subsections (a)(1) and (a)(2) of the FCA, show that a false or fraudulent claim was submitted to the Government. In addition, no caselaw has been identified nor has any been found that would support the proposition that a violation of subsection (a)(2) of the

FCA does not require evidence of the submission of a false or fraudulent claim to the Government. A brief summary of the most recent, relevant Order of each of the nine Federal Circuit Courts follows.

The First Circuit has held that "the statute attaches liability not to the underlying fraudulent activity or to the government's wrongful payment, but to 'the' claim for payment.'" *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). In *Rivera*, the First Circuit was reviewing the appeal of a motion for summary judgment in a case brought pursuant to 31 U.S.C. §§3729-3733 wherein the Government had asserted that the defendants caused a bank to submit an inflated claim for payment to the Government. *Id.* at 706. The First Circuit found that the violation of the FCA by the defendants was committed when the bank presented its claim to the Government. *Id.* at 707.

The Third Circuit has held that, "In order to prove a claim under §3729(a)(2), a plaintiff must also show that the defendant made or used (or caused someone else to make or use) a false record in order to cause the false claim to be **actually** paid or approved." *United States v. Schmidt*, 386 F.3d 235, 243 (3rd Cir. 2004) (emphasis added). In *Schmidt*, the Third Circuit was reviewing an appeal of the dismissal of an FCA claim brought pursuant to subsections (a)(1) and (a)(2). *Id.* at 237. The FCA action was brought against a manufacturer of orthopedic implants who allegedly caused a hospital to submit a false or fraudulent claim to the government for Medicare reimbursement. *Id.* at 237. The Third Circuit, in a later case, again confirmed that, for liability to attach under subsection (a)(2), a false or fraudulent claim for payment must be submitted to

the Government. *United States ex rel. Quinn v. Omnicare*, 382 F.3d 432, 438 (3rd Cir. 2004).

The Fourth Circuit has found that the FCA "at least requires the presence of a claim - call upon the government fisc - for liability to attach." *Harrison v. Westinghouse Savannah River Company* 176 F.3d 776, 785 (4th Cir. 1999). Said another way, the FCA attaches liability not to the underlying fraudulent activity or to the government's payment, but to the 'claim for payment.' *Id.* at 785. In *Harrison*, the Fourth Circuit was reviewing an appeal of the dismissal of a charge, among others, that a false statement by a subcontractor resulted in a false claim to the government by a prime contractor. *Id.* at 793.

The Fifth Circuit has held that, "Although §3729(a)(2) prohibits the submission of a false record or statement, it does so only when the submission of the record or statement was done in an attempt to get a false claim paid. There is no liability under this Act for a false statement unless it is used to get [a] false claim paid." *United States v. Southland Management Corp.*, 326 F.3d 669, 675 (5th Cir. 2003). In *Southland*, the Fifth Circuit was reviewing the appeal of a summary judgment. *Id.* at 669.

The Sixth Circuit, in affirming the dismissal of a relator's FCA claim, indicated as a basis for dismissal that "he is unable to identify a specific claim submitted directly to the United States by a prime contractor ... " who incorporated the subcontractor's work into the finished product that was then sold to the government. *Yuhasz v. Brush Wellman*, 341 F.3d 559, 564-65 (6th Cir. 2003). While the underlying claim was brought pursuant to subsection (a)(1), the Court referred to both Sections 3729(a)(1) and (a)(2) of the FCA when rendering its opinion and the Sixth

Circuit was addressing a claim against a subcontractor.

In a very recent opinion, the Sixth Circuit has said that liability for an allegation brought pursuant to subsection (a)(2) "attaches only where the claim itself is false or fraudulent and the false record or statement is being used "to get" that false claim paid. Put another way, a false statement or record within a true claim is not actionable under the FCA." "Thus, liability does not arise merely because a false statement is included within a claim, but rather the claim itself must be false or fraudulent." *United States of America ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, No. 02-6545, slip op. at 13 (6th Cir. Mar. 10, 2005).

The Eighth Circuit has found that only those actions by a claimant which have the effect of causing the United States to pay out money it is not obligated to pay are actionable. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998). In *Costner*, the Eighth Circuit was reviewing the appeal of a motion to dismiss a case where a subcontractor allegedly received money from a private trust fund and no federal funds were ever intermingled with that fund. *Id.* In addition, no money disbursed from the private trust fund was ever reimbursed by the Government. *Id.* The subcontractor was dismissed by the Eighth Circuit. *Id.*

The Ninth Circuit began an opinion rendered in 2002 with the statement that, "It seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim." *United States v. Kitsap Physicians Service*, 314 F.3d 995, 996 (9th Cir. 2002). In *Kitsap*, the Ninth Circuit was reviewing a dismissal on summary judgment of an allegation, brought pur-

this contract is with regard to the percent of physical completion and the allowable costs incurred that must be certified on each invoice. There is no evidence of a required continuing certification with regard to quality which is the issue being tried in this case.

Therefore, since there are no "regulations" with which Bath was required to comply, the "implied certification" theory is not well founded. Even if the DDG-51 Award could be construed to be a regulation, which it cannot, the DDG-51 Award in evidence does not provide for a continuing certification with regard to quality on each invoice.

SUMMARY AND CONCLUSIONS

To sustain a claim pursuant to subsections (a)(1) and (a)(2) of the FCA, the Relators are required to show that a false or fraudulent claim was submitted to the Government. Further, inferred invoices submitted by Bath to the Government pursuant to the DDG-51 Award are not false invoices pursuant to the "implied certification" theory.

In this case, the only entities that could have submitted actionable claims to the Navy were the prime contractors, Bath Iron Works and Ingalls. During their case in chief, the Relators presented no evidence that either Bath Iron Works or Ingalls submitted false or fraudulent claims to the Government or evidence from which the Jury could infer that either Bath Iron Works or Ingalls submitted false or fraudulent claims to the Government.

In addition, violation of Section 3729(a)(3) ("subsection (a)(3)") requires a false or fraudulent claim. *United States v. Murphy*, 937 F.2d 1032, 1038-39 (6th Cir. 1991). Since Relators have not shown that there has been a false or fraudulent claim in this case, Re-

count of the total contract price ... " (PX 128, p. 73.) Page 76 of the DDG-51 Award then indicates that:

> The Contractor shall certify on each Invoice:
>
> (1) the percentage of physical progress in the performance of work on the vessel as a decimal carried to four places; and
>
> (2) the allowable costs incurred in the performance of the work on the vessel as of the date the invoice is submitted. Such certification shall provide for cost category reporting in accordance with the Contractor's normal accounting system and shall be broken down into direct material, direct labor and indirect costs.

No further certification requirements are to be found in the DDG-51 Award that was admitted into evidence.

Having set forth what they believed to be the underlying "regulation on which payment is conditioned," the Relators then argued that the Jury could infer that Bath submitted invoices to the Government because the ships were continuing to be built. And, since the Jury could infer that Bath submitted invoices, the Jury could find that Bath had submitted false invoices pursuant to the "implied certification" theory. This, of course, is in light of Relators' initial argument that they were not required to submit Bath invoices to the Jury.

Even if the Jury could infer that Bath submitted invoices to the Government, there is no evidence that Bath had a continuing duty to comply with any "regulations" let alone certify its compliance with any "regulations." Even if the Court could infer that the DDG-51 Award was a "regulation," the only evidence of a required "continuing certification" with

base this argument on the theory of "implied certification" espoused by the Sixth Circuit in *United States ex rel. Augustine v. Century Health Services Inc.*, 289 F.3d 409 (6th Cir. 2002).

The "implied certification" theory holds that "a false implied certification may constitute a false or fraudulent claim even if the claim was not expressly false when it was filed. Instead, liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned." 289 F.3d at 415. The theory of "implied certification" is applied where the underlying statute or regulation expressly states that payment is conditioned upon compliance with the underlying statute or regulation. *Id.* at 414 (citing *Mikes v. Straus*, 274 F.3d 687, 700 (2nd Cir. 2001)).

The Relators argued that Bath submitted a false "implied certification" to the Government. When asked, the Relators identified the Solicitation Offer and Award issued by the Department of the Navy to Bath Iron Works on April 2, 1985, as the underlying "regulation" with which Bath was required to comply. (PX 128.) This Solicitation Offer and Award (the "DDG-51 Award") is in the amount of $321,964,557 and appears to be for the design and construction of one ship, DDG-51. (Id.) Relators also indicated that the specific certification requirement is found on pages 73 and 74 of the DDG-51 Award.

Page 73 of the DDG-51 Award contains several paragraphs regarding the computation of payments under the Award. Specifically, the DDG-51 Award requires that, "the Government, upon submission by the Contractor of invoices certified by the Contractor as hereinafter provided, will make payments, on ac-

that *Totten* was issued on August 27, 2004 and rehearing *en banc* was denied on December 8, 2004. However, there is no record that *Totten* has, thus far, been appealed nor do Relators indicate that it has been appealed, only that it "will be."

Finally, the Relators have, themselves argued in this case that liability for a false statement requires that a false or fraudulent claim be submitted to the Government. In their Consolidated Memorandum In Opposition To Defendants' Motions To Dismiss the Amended Complaint filed on July 30, 1999, the Relators state that, "In fact, the law is settled that a subcontractor can violate the False Claims Act when its conduct causes a prime contractor (either knowingly or not) **to submit to the Government a claim of its own that is in fact false**." (Doc. #44, p. 19 (emphasis added) citing *United States v. Bornstein*.)

Conclusion

Nine Circuit courts have found that a violation of subsection (a)(2) of the FCA requires a showing that a false or fraudulent claim has been presented to an officer or employee of the Government. In addition, the detailed opinion of the *Totten* majority on this matter is persuasive. The only contrary finding is by a single judge, the dissent in *Totten*. Finally, the Relators have previously agreed with this requirement. Therefore, a violation of subsection (a)(2) of the FCA requires a showing that a false or fraudulent claim has been submitted to an officer or employee of the United States Government.

THE PRESENTMENT OF A FALSE CLAIM

After arguing that a false claim need not be presented for liability pursuant to subsection (a)(2) to attach, the Relators then argue that evidence of a false claim has been presented in this case. Relators

which caused the prime contractor to submit false claims to the Government for radio kits. *Id.* at 307.

The Relators next argue that the Fifth Circuit has issued another opinion after *Clausen* where they backed away from their *Clausen* holding. However, *Clausen* is an Eleventh Circuit case and the only FCA opinion issued since *Clausen* by the Eleventh Circuit that cites *Clausen* is *Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936 (11th Cir. 2003). And, *Hill* merely restates the holding from *Clausen* that "without the presentment of a false or fraudulent claim ... there is simply no actionable damage to the public fisc as required under the FCA." *Id.* at *2. Further, there is no indication that the Fifth Circuit has cited *Clausen* in any subsequent opinion. Next, the Relators attempt to distinguish *Totten* on the basis that *Totten* applies to a situation where "money doesn't flow." In *Totten*, the Government gives a block grant to a grantee and, while the grantee is regularly paying "subcontractors, "there are no requests regularly going from the grantee to the Government. The *Totten* Court agreed that the grantee was not the Government or an arm of the Government.

However, the same reasoning used by the majority in *Totten* would apply to a prime contractor as well as it does to a grantee who is not the Government or an arm of the Government. In many respects, the reasoning in *Totten* need not be extended as far to reach a prime contractor as to reach a grantee. Finally, the *Totten* court did not indicate that its holding does not apply to situations where a grantee was replaced by a prime contractor.

The Relators also argue that the *Totten* case will be taken to the Supreme Court. The record indicates

The dissent's response to this policy argument is that the FCA limits damages to those that the government sustains and, although determining whether the government has been damaged by fraud may be difficult in some cases, in others it will not. *Id.* at 514. However, the dissent does not address the forfeiture penalty that applies whether or not the government can prove actual damages. Also, ironically, the dissent argues that, "if traceability is a problem, it is a problem borne by the plaintiff who must prove that the claim was **"paid ... by the Government"** in order to establish liability under §3729(a)(2). *Id.*

Relators' Additional Arguments Regarding the Presentation of a False Claim

The Relators' argument regarding the presentation of a false claim began with an analysis of the language of the FCA which is addressed by the preceding analysis of the *Totten* case. Relators next cite *United States ex rel. Marcus v Hess* for support. 317 U.S. 537 (1943). Yet *Marcus* does not support the Relators' argument because the defendants in *Marcus* caused the government to pay claims of the local sponsors in order that they might in turn pay the defendants under contracts executed as the result of fraudulent bidding. *Id.* at 543. Thus, in *Marcus*, the subcontractors made false statements but there was evidence of false claims made directly to and paid directly by the government to local sponsors as a result of those false statements.

The Relators next cite *United States v. Bornstein* for support. 423 U.S. 303 (1976). Yet, *Bornstein* does not support the Relators' argument because, in *Bornstein*, a subcontractor made three shipments of falsely branded electron tubes to a prime contractor

forth three policy arguments. First, extending false claims act liability could result in quadruple liability for false claimants in that a grantee could bring suit and obtain a recovery for itself in addition to the treble damages available to the relator and the Government. *Id.* at 496. The dissent responds that other FCA requirements would prevent this because recovery is permitted only on behalf of the government and only for damages sustained by the Government. Yet, the FCA provides for forfeitures in addition to the damages sustained by the Government and the dissent overlooks the possibility of a state-law breach-of-contract suit by the grantee.

The second policy argument set forth by the majority is that authorizing suit on behalf of an entity to which a claim was not presented raises complicated questions in applying the FCA's scienter requirement. *Id.* at 496. It is unclear to the majority as to how to apply the "knowingly" requirement when the Government itself or a relator brings suit for claims made to a grantee if there is no longer any requirement of presentment to the Government. *Id.* The dissent does not respond to this argument in that the dissent believes that this argument has no relevance to subsection (a)(2) because the "knowingly presents" language does not apply to subsection (a)(2). *Id.* at 514, n.18.

The third policy argument set forth by the majority is that a reading of the act as the dissent wishes would make the potential reach of the Act almost boundless. *Id.* at 496. For example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants as most do. *Id.*

does not require the presentation of a claim to the Government. *Id.* at 510-11. Here again, contrary to its argument that the relevant subsections should be read together, the dissent is reading subsection 3729(c) alone without adding all of the requirements of subsections (a)(1) and (a)(2).

Both the majority and the dissent refer to scholarly comments on subsections (a)(1) and (a)(2). However, neither are substantive nor are they persuasive.

Legislative History Argument on Subsection (a)(2)

The dissent next turns to the legislative history of the 1986 Amendments to the FCA. *Id.* at 511. The dissent argues that the purpose of the 1986 Amendments was to "clarify" the FCA and the definition of claim was added to permit the Government to sue for frauds perpetrated on federal grantees. *Id.* at 512. In support, the dissent cites a Senate Judiciary Committee statement that a false claim is actionable although the false claim was made to a party other than the government and the House Judiciary Committee agreed. *Id.* The Senate Judiciary Committee added that the new definition of claim was added in response to earlier court holdings that a fraud against the grantee does not include a fraud against the government. *Id.*

The majority does not rely upon these statements because they were based upon a version of the bill that did not yet include the addition of the words "by the Government" to subsection (a)(2). *Id.* Further, the legislative history is silent on why the words "by the Government" were added. *Id.*

The Policy Arguments on Subsection (a)(2)

The final area of which the dissent is critical is policy considerations. *Id.* at 514. The majority sets

law cited in support of this belief is the Supreme Court's statement that the act was intended to reach all types of fraud that might result in financial loss to the government. *Id.* at 509. No caselaw directly on point is cited.

The dissent next criticizes the majority's interpretation of the legislative history surrounding subsections (a)(1) and (a)(2). The majority refers to the legislative history for an explanation of why subsections (a)(1) and (a)(2) should be read in conjunction with subsection (c).

The phrase "by the Government" was added in 1986 at the same time as the definition of "claim" was added at subsection (c). On this both the majority and the dissent agree.

The dissent goes on, however, to argue that, rather than adding something new to the FCA, the words "were intended to clarify what the Supreme Court has long held: that the FCA reaches only those false claims that ultimately result in losses to the United States." *Id.* at 508. The basis for this argument is that the overall stated purpose of the 1986 Amendments was to "clarify" the FCA. *Id.* at 508.

Yet, the majority argues that something new was, in fact, added in 1986, the "by the government" language. *Id.* at 499. And the "by the government" language was added at the same time that the definition of claim was added in subsection (c). *Id.* The majority concluded that, by adding the "by the government" language, Congress was referring back to the presentment requirement of subsection (a)(1). *Id.*

The dissent then makes one last attempt to argue that the definition of a "claim" in subsection (c), when examined together with subsections (a)(1) and (a)(2), leads to the conclusion that subsection (a)(2)

of this argument, the dissent cites the definition of claim in subsection (c) wherein a request for money is a claim if the United States Government provides any portion of the money. *Id.* However, the majority has reasoned, as stated above, that subsection (c) can and is to be read in conjunction with subsections (a)(1) and (a)(2) and not as a separate requirement or as providing a definition of "by the government." The majority also responds that the dissent has to alter the words to make a plain language argument by asserting that "paid by the Government" means "paid with government money."

The dissent next argues that, if subsection (a)(2) is read to require that a claim be presented to the Government, it is then "swallowed" by subsection (a)(1). Yet, the majority points out that subsections (a)(1) and (a)(2) were once in one "unwieldy" sentence and that this sentence was dividend into the numbered subsections of Section 3729(a) in 1982 with the stated purpose of making no substantive changes to the law. *Id.* at 500. Therefore, subsection (a)(2) is the "direct descendant of a clause that could only be read in conjunction with what is now Section 3729(a)(1) ..." *Id.*

The majority also argues that subsections (a)(1) and (a)(2) have different meanings and applications. Subsection (a)(1) refers to presenting claims to the Government for "payment or approval" while subsection (a)(2) refers to making false statements that result in false or fraudulent claims being paid. *Id.* at 499-500. Subsection (a)(2) could only, therefore, be read in conjunction with subsection (a)(1). *Id.* at 500.

The dissent responds that, in his view, the second clause of the pre-1982 FCA did not contain a presentment requirement. *Id.* at 508. However, the only

that, since the language in the subsections is different, Congress must have intended the meanings to be different and payment by an entity that has received government funds is the same as payment "by the Government". *Id.*

However, the majority concludes that payment by an entity that has received Government funds, a grantee in the *Totten* case, is not the same as payment "by the Government." *Id.* at 499. The majority bases this conclusion upon textual interpretation and legislative history. *Id.* at 498-99.

First, the majority reasoned that if Congress had intended to predicate liability under subsection (a)(2) on payment or approval either by the Government or by an entity that had received Government funds, then a reference to false records or statements made "to get a false or fraudulent claim paid or approved" would have been enough without the requirement that the claim be paid or approved "by the government." *Id.* Yet, the "by the government" language was added in 1986 at the same time that the definition of claim was added in subsection (c). *Id.* at 499. The majority concluded that by adding the "by the government" language, Congress was referring back to the presentment requirement of subsection (a)(1). *Id.*

The dissent's response is that, if Congress meant the same thing it would have said the same thing. *Id.* at 505. The majority then argues that the payment to the defendants in *Totten* was not a payment "by the government" and was a payment by an entity that had received government funds. *Id.*

The dissent's next response is that the fact that expenses are paid by an entity does not mean that the entity paid them directly. *Id.* at 506. In support

fraudulent claim is presented to an officer or employee of the United States Government. Although subsection (a)(2) does not contain specific language requiring that a false or fraudulent claim be "presented to an officer or employee of the United States," according to the *Totten* Court, this section does require that a false or fraudulent claim be paid or approved "by the Government." *Id.* at 498.

One of the three judges in *Totten* dissented on the issue of whether subsection 3729(a)(2) requires proof that a false or fraudulent claim be submitted to the Government. The arguments presented by Relators' Counsel in this case are the same as some of the arguments presented by the dissent in *Totten*. Therefore, examining the dissent's arguments in *Totten* will serve to also examine some of the Relators' arguments regarding subsection (a)(2) in this case.

The *Totten* dissent argues that the majority's interpretation of subsection (a)(2) as requiring presentment is inconsistent with its plain text and is inconsistent with the statutory definition of "claim" contained in Section 3729(c). *Id.* at 503. The dissent also argues that the Court's interpretation is inconsistent and irreconcilable with the legislative history of the 1986 Amendments to the FCA. *Id.* Finally, the dissent argues that the policies upon which the majority relies are faulty. The textual argument will first be examined followed by the legislative history and the policy arguments.

Textual Argument on Subsection (a)(2)

The dissent argues that, while subsection (a)(1) contains presentment language, subsection (a)(2) contains no express requirement of presentment to an officer or employee of the United States Government. *Id.* at 506. From this, the dissent concludes

Analysis of *Totten*

The *Totten* decision was rendered by two of a three judge, *en banc*, panel of the District of Columbia Circuit. The Court analyzed the requirements of both subsections (a)(1) and (a)(2) in detail. All three judges agreed regarding subsection (a)(1) and one judge dissented with regard to the decision on subsection (a)(2).

Subsection (a)(1)

The *Totten* Court based its decision regarding subsection (a)(1) on a plain reading of the "clear and unambiguous" language. *Id.* at 492. Further, the Totten Court "squared" the presentation requirement in subsection (a)(1) with the definition of a "claim" found in Section 3729(c) ("subsection (c)") by finding that nothing in the language of subsection (c) requires ignoring the language of subsection (a)(1). *Id.* at 493. In other words, subsections (a)(1), (a)(2) and (c) should be read and applied together.

To confirm its conclusion that the language in subsection (c) can be read without ignoring the language in subsection (a)(1), the *Totten* Court applied the two "if' clauses in the definition of claim in subsection (c) to the language in subsection (a)(1). The Court found that FCA liability attaches when the Government provides the funds to the grantee upon presentment of a claim to the Government or if, after the grantee presents the claim, the Government provides the funds directly to the claimant. *Id.* Liability also attaches if the government, upon presentment of the claim, reimburses the grantee for funds that the grantee has already disbursed to the claimant. *Id.*

Subsection (a)(2)

The *Totten* majority also found that subsection (a)(2) did not provide for liability unless a false or

suant to 31 U.S.C. §3729-3733, that false bills had been submitted to Medicare. *Id.* at 998. The Court found that the allegation of a private false scheme is not enough without showing an actual false claim for payment to the Government. *Id.* at 1002.

The Eleventh Circuit, when considering claims brought pursuant to Sections 3729(a)(1), (a)(2) and (a)(3) of the FCA, determined that the FCA does not create liability for a health care provider's disregard of Government regulations or improper internal policies unless there is a presentment of a claim to the Government. *United States ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). In *Clausen*, the Eleventh Circuit was addressing the appeal of a motion to dismiss a claim alleging that a corporation submitted false claims for payment to medical programs of the United States. *Id.* at 1301.

More recently, the District of Columbia Circuit performed a detailed analysis of the FCA and concluded that, to be actionable under either subsection (a)(1) or (a)(2), a false or fraudulent claim must be presented to an officer or employee of the United States Government. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492-93. (D.C. Cir. 2004), *reh'g en banc denied* (Dec. 8, 2004). The *Totten* Court concluded that a false claim that is not presented to an officer or employee of the United States Government is not actionable simply because payment will come out of funds received from the federal government. *Id.* Since the *Totten* holding was argued by the Parties in this case with regard to whether a false or fraudulent claim must be submitted by the Government, this opinion will be reviewed in some detail.

lators' claim with regard to Section 3729(a)(3) must fail.

Pursuant to Fed.R.Civ.P. 50(a)(1), the Relators have been fully heard on their complaints and there is no legally sufficient basis for a reasonable jury to find under the controlling law that any of the Defendants violated 31 U.S.C. §3729(a)(1), (a)(2) and (a)(3). Therefore, the Defendants' Motion for Judgment As a Matter Of Law as to Relators' claims brought pursuant to 31 U.S.C. §3729(a)(1), (a)(2) and (a)(3) is GRANTED.

The Defendants' Rule 50(a) Motion regarding all false claims counts also argues that, assuming Relators had produced evidence of false or fraudulent claims, they have not satisfied the materiality element of their claims. Although, based upon the *A+ Homecare* opinion just issued by the Sixth Circuit, materiality is relevant in this case. However, since the Court does not have a false or fraudulent claim to consider, the Court cannot address the materiality argument now. It is MOOT.

In addition, the Rule 50(a) Motion regarding Damages (Doc. #670) is now MOOT. Also, the pending oral Rule 50(a) motion with regard to paragraphs 159 through 161 of Relators' Second Amended Complaint is MOOT.

The Relators have presented facts upon which a reasonable juror could find that Defendant General Tool retaliated against Roger Sanders in violation of 31 U.S.C. §3730(h) and in violation of Ohio Public Policy. Therefore General Tool Company's oral Rule 50(a) Motion is not well-founded and is OVERRULED.

Following the issuance of the Court's summary opinion regarding the above matters on the record on

March 7, 2005, the Relators dismissed their Retaliation claims without prejudice. These claims were dismissed without prejudice under certain conditions that were agreed to by General Tool Company.

The dismissal of the only remaining claims renders Relators' pending Motion for Rule 54(b) Certification (Doc. #472) MOOT. The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio, this Eleventh day of March, 2005.

s/

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copied furnished to:

Counsel of Record

APPENDIX C

No. 05-3502

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
APR 20, 2007
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA *ex rel.* ROGER L. SANDERS AND ROGER L. THACKER,	)	ORDER
Relators-Appellants,	)	
v.	)	
ALLISON ENGINE COMPANY, INC., ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

OPPOSITION BRIEF

FILED
SEP 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-214

In The Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* ROGER L. SANDERS AND ROGER L. THACKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS ROGER L. SANDERS' AND ROGER L. THACKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT A. POWELL
DON MCKENNA
HARE, WYNN, NEWELL & NEWTON
The Massey Building, Suite 800
2025 Third Avenue, North
Birmingham, AL 35203
(205) 328-5330

JAMES B. HELMER, JR.
Counsel of Record
PAUL B. MARTINS
ROBERT M. RICE
HELMER, MARTINS, RICE & POPHAM CO., L.P.A.
600 Vine Street, Suite 2704
Cincinnati, OH 45202
(513) 421-2400

Counsel for Respondents Relators Roger L. Sanders and Roger L. Thacker

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

ARGUMENT 13

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE SIXTH CIRCUIT'S INTERPRETATION OF FCA SECTIONS (a)(2) AND (a)(3), AND THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENT 13

A. Only One Other Circuit Court Has Addressed The "Presentment" Issue, And Its Ultimate Holding Is Fully Consistent With The Decision Below 13

B. The Decision Below Does Not Conflict With This Court's Precedent 18

II. THE SIXTH CIRCUIT'S DECISION ADHERES TO THE PLAIN TEXT OF THE FALSE CLAIMS ACT, THE 1986 FCA LEGISLATIVE HISTORY AND THIS COURT'S PRECEDENT 23

A. The Sixth Circuit Correctly Found That "Presentment" Is Not A Requirement Of Section (a)(2) Or Section (a)(3) 23

TABLE OF CONTENTS–Continued

Page

B. The Sixth Circuit's Decision Does Not Raise New Issues But Instead Simply Reaffirms The Accepted Broad View Of The FCA 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Barnhart v. Sigmon Coal Co.,
534 U.S. 438, 122 S. Ct. 941,
151 L. Ed. 2d 908 (2002) 25

Brown v. Gardner,
513 U.S. 115 (1994) 28

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 24

Davis v. Michigan Dept. of Treasury,
489 U.S. 803 (1989) 28

Dixson v. United States,
465 U.S. 482 (1984) 20

Environmental Def. v. Duke Energy Corp.,
127 U.S. 1423 (2007) 19

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 28

Nat'l Park Hospitality Ass'n v. DOI,
538 U.S. 803 (2003) 19

Rainwater v. United States,
356 U.S. 590 (1958) 12

Russello v. United States,
464 U.S. 16, 104 S. Ct. 296,
78 L. Ed. 2d 17 (1983) 25

Securities Indus. Ass'n v. Board of Governors,
468 U.S. 137 (1983) 19

Tanner v. United States,
483 U.S. 107 (1987) 18, 19, 20, 21, 22

TABLE OF AUTHORITIES–Continued

Page

United States v. Azzarelli Construction Co.,
647 F.2d 757 (7th Cir. 1981) 22

United States v. Bornstein,
423 U.S. 303 (1976) 7, 8, 27

United States v. Katz,
271 U.S. 354 (1926) 29

United States v. Murphy,
937 F.2d 1032 (6th Cir. 1991) 7

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 11, 12

United States ex rel. Aakhus v. Dyncorp, Inc.,
136 F.3d 676 (10th Cir. 1998) 14, 15

United States ex rel. Compton v. Midwest Specialties, Inc.,
142 F.3d 296 (6th Cir. 1998) 7

United States ex rel. Corsello v. Lincare, Inc.,
428 F.3d 1008 (11th Cir. 2005) 14, 15

United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.,
460 F.3d 853 (7th Cir. 2006) 17

United States ex rel. Joshi v. St. Luke's Hospital, Inc.,
441 F.3d 552 (8th Cir. 2006) 14, 15

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 7, 8, 11, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Murphy, 937 F.2d 1032 (6th Cir. 1991) 7

United States ex rel. Quinn v. Omnicare, Inc., 382 F.3d 432 (3d Cir. 2004) 14, 15

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) ..... *passim*

STATUTES

18 U.S.C. § 371 ..... 19, 20

31 U.S.C. § 3729 7

31 U.S.C. § 3729(a)(1) ..... *passim*

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) ..... *passim*

31 U.S.C. § 3729(b) 5

31 U.S.C. § 3729(c) 10, 21, 26

OTHER AUTHORITIES

H.R. Rep. No. 99-660, at 21 (1986) 11

S. Rep. No. 99-345, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 11, 17, 22, 30

James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* § 3-16 (Top Gun Publishing, 5th ed. 2007) 7

INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioners Allison Engine Company, Inc., General Motors Corporation, General Tool Company and Southern Ohio Fabricators, Inc. There is no true conflict among the circuits nor any conflict with this Court's precedent. There was also no error below, as the Sixth Circuit's well-reasoned decision follows the plain text of the False Claims Act ("FCA"), honors the legislative history of the 1986 FCA amendments, and is fully consistent with past decisions of this Court and those from other circuits. All these sources make clear that the FCA must be broadly construed to reach all fraudulent efforts to obtain taxpayer funds. This reach explicitly extends to Government subcontractors even if their false claims for public monies are not presented or represented directly to an employee of the United States. The United States appeared as *amicus curiae* in the court below to reaffirm this as the accepted view of the FCA. So this case does not raise any new or unsettled questions. It merely confirms that fraud practiced by the Government's subcontractors is forbidden by the FCA.

STATEMENT OF THE CASE

The Petitioners in this case are four Government subcontractors who were paid hundreds of millions of

taxpayer dollars to build generator sets for the United States Navy. In exchange for such large public outlays, these four subcontractors promised by contract to build the generator sets ("Gen-Sets") to exacting Navy specifications. They did not do so.

For many years the Gen-Sets were made with defective materials, by unqualified personnel and without undergoing a variety of mandatory quality-control inspections. Yet these subcontractors falsely certified that the Gen-Sets had actually been built as the Navy demanded, and claimed payment from the Navy's prime-contractor shipyards as though the Gen-Sets were properly made. It is undisputed that every dime of the millions of dollars received by the defendant subcontractors came from the United States Treasury.

The question presented on appeal is simply whether the FCA reaches the subcontractor Petitioners' misconduct even though the Navy's prime-contractor shipyards never re-presented Petitioners' fraudulent claims for payment directly to the Navy. This question was long-ago answered in the affirmative. As the decision below explained at length, Congress made abundantly clear in amending the FCA in 1986 that fraudulent claims made by the Government's subcontractors to its prime contractors are (and must be) actionable in order to responsibly protect taxpayer funds. Pet. App. at 1a-25a.

Protecting the public fisc from the fraudulent claims by the subcontractor Petitioners in this case is

exactly what the FCA was designed to accomplish. Relators Roger Sanders and Roger Thacker (former employees of General Tool Company) brought this case in 1995 because General Tool Company and its co-defendants had for years violated important contract quality provisions in making the Navy's Gen-Sets. These Gen-Sets are mission-critical hardware, supplying all electrical power for the Navy's new fleet of guided-missile destroyers, the *Arleigh Burke* class.

Production of the Navy's destroyers began in the late 1980s by two prime-contractor shipyards. The shipyards subcontracted with Allison Engine Company, Inc. (a division of General Motors Corporation through 1993) to provide the Gen-Sets. In turn, General Motors/Allison hired General Tool Company to assemble the Gen-Sets with the General Motors/Allison jet engine as the power source. Southern Ohio Fabricators, Inc. ("SOFCO") was hired to build the metal Gen-Set bases and enclosures. The Navy's detailed specifications for Gen-Set construction and quality were incorporated into all of the contracts awarded to these defendants.

Petitioners regularly violated the Navy's specifications. From the many Gen-Set defects uncovered during discovery, Relators focused on three at trial: (1) Unqualified SOFCO welders worked on every one of the first 67 Gen-Sets; (2) General Motors/Allison and General Tool Company worked together to install defective Gen-Set gearboxes in the first 52 units; and (3) General Tool Company failed to conduct a quality Final Inspection for almost half of the first 67 Gen-Sets.

These Gen-Set quality defects violated the Navy's specifications, which Petitioners promised by contract to follow for all aspects of their Gen-Set work.

Payment on these contracts occurred nonetheless, with every nickel coming from United States taxpayers. The direct and orderly flow of money from public coffers to these defendants happened in typical fashion on a Government procurement project of this type. Over the course of building destroyers that would eventually cost the taxpayers $1 billion each, the Navy made regular payments to the shipyards after various production milestones were reached. In turn, the shipyards paid invoices submitted by General Motors/Allison based on milestones reached in making the Gen-Sets; General Motors/Allison paid invoices submitted by General Tool Company based on milestones reached in the Gen-Set assembly process; and General Tool Company paid invoices submitted by SOFCO based on milestones reached in making Gen-Set bases and enclosures.

As a result of this milestone payment plan, Petitioners collectively submitted thousands of claims for payment for their work on the first 67 Gen-Sets, and all such claims were paid despite the hidden defects in the Gen-Sets. Boxes of these claims for payment were admitted into evidence. These were all false claims for taxpayer funds.

In addition to their false claims for payment, General Motors/Allison and SOFCO explicitly and falsely certified that their Gen-Set work conformed to

all of the Navy's specifications. Every Gen-Set delivered to the shipyards was accompanied by a Certificate of Conformance signed by General Motors/ Allison declaring that the Gen-Set as a whole had been manufactured according to all contract terms. For its part, SOFCO signed and submitted hundreds of Certificates of Conformance attesting that every piece of each Gen-Set base and enclosure met the Navy's specifications. All of these express certifications for the first 67 Gen-Sets were admitted into evidence. All were false, again because the concealed defects meant that the Gen-Sets did not comply with all contract terms or the Navy's specifications.

Petitioners knew, deliberately ignored or recklessly disregarded that the Gen-Sets did not meet the contract terms and Navy specifications.[1] On several occasions, including before Gen-Set work even began, these defendants all learned that some – and often all – SOFCO welders were not military standard qualified to work on this Navy project. Those welders continued working anyway, and without stopping to obtain proper qualifications.

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[1] The FCA reaches only "knowing" conduct, which the FCA defines as follows: "For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information – (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

Over this same period, General Motors/Allison encountered hazardous defects with the Gen-Set gearboxes in violation of their contracts (including continuous oil leaks, a recognized fire hazard on a combat vessel). But those serious problems were not resolved and the gearboxes were not brought into contract compliance. The gearbox defects were patched and concealed without being fixed, the Gen-Sets were shipped, and the defects reemerged after the units were installed in the destroyers. And compounding matters, General Tool Company often omitted entirely the critical Final Inspection of the completed Gen-Sets required by the Navy. To hide this failure, General Tool Company falsified the documentation to make it appear as though the Final Inspection had actually been accomplished.

Relators alleged that by all this misconduct, the defendants violated three distinct sections of the FCA:

> (a) Liability for certain acts. Any person who –
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or

> statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
>
> . . . is liable to the United States Government
> . . .

31 U.S.C. § 3729.

Application of these provisions to the subcontractor Petitioners' conduct in this case was hardly novel. It has long been the law that Government contractors who violate the terms of their contracts, yet make claims for payment under those contracts despite knowing that all contract requirements have not been met, are liable under the FCA. *E.g. United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943); *United States v. Bornstein*, 423 U.S. 303, 313 (1976); *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998). *See also* James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* § 3-16 (Top Gun Publishing, 5th ed. 2007). FCA liability for subcontractor conspiracies is similarly well-settled. *E.g. United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991).

Thus, in this case, the false claims are the false milestone invoices from each defendant, the false records are the false Certificates of Conformance from General Motors/Allison and SOFCO, and the conspiracy involved General Motors/Allison's and General

Tool Company's collective efforts to conceal gearbox defects. The falsity of the invoices and records, as well as the sufficiency of the defendants' FCA "knowledge," is presumed on appeal.

Going beyond the Navy's prime contractors to pursue these subcontractor defendants for their fraudulent conduct is consistent with this Court's venerable and expressed recognition that Congress meant the FCA to reach beyond the Government's prime contractors to all fraudulent efforts to obtain taxpayer funds: "These provisions [Sections (a)(1), (a)(2) and (a)(3)], considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Marcus*, 317 U.S. at 544-45.

More than three decades after *Marcus*, this Court confirmed that the focus of FCA actions alleging fraudulent conduct by subcontractors should be on the subcontractors, not the prime contractors: "A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Bornstein*, 423 U.S. at 313.

As mandated by this precedent, the Relators in this case focused on the conduct of the fraudfeasor Petitioner subcontractors rather than the blameless shipyard prime contractors. The district court found

this focus to be legally deficient. On motion for a directed verdict at the close of Relators' evidence, the district court accepted as true the following: Petitioners knowingly submitted thousands of false claims for payment for their Gen-Set work, knowingly made and used hundreds of false Certificates of Conformance to get false claims paid, knowingly conspired to get false claims paid, and were paid hundreds of millions of taxpayer dollars as a result of their fraudulent conduct. In other words, the district court accepted as true that these Petitioners did not make the Navy's Gen-Sets as the Navy wanted and as each defendant promised, and concealed the Gen-Set defects with false claims and false statements in order to be paid taxpayer money nonetheless.

For the district court, such evidence of fraudulent taking of public money did not trigger the protections of the FCA. The district court found, based solely on reasoning borrowed from *dicta* in the majority opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), that the Petitioners' false claims could never be actionable under any section of the FCA without proof that the prime-contractor shipyards "presented" (or, more accurately, "re-presented") those false claims directly to the Navy. Pet. App. at 47a-56a. Since Relators had not focused their case on the conduct of the non-defendant prime-contractor shipyards, and thus had not evidenced the details of the ministerial process by which the shipyards regularly and indisputably drew

down public funds for payment to the Petitioner subcontractors, the district court dismissed the case.

The Sixth Circuit reversed. While agreeing with the district court (and *Totten*) that "presentment" of false claims to a Government official is required to establish liability under FCA Section (a)(1), the majority held that no such proof is required for liability under Sections (a)(2) or (a)(3). Pet. App. at 4a-25a. The majority then systematically demonstrated that its holding was supported by the plain text of the FCA, the legislative history to the 1986 FCA amendments and the decided weight of authority, and was consistent with the holding (although not the *dicta*) of the *Totten* decision.

The majority first observed that "presentment" simply does not appear in the plain text of Sections (a)(2) or (a)(3), nor was there any apparent reason to add such language. Pet. App. at 7a. On the contrary, Congress added a definition of "claim" in 1986 to clarify that false claims are actionable under the FCA even if they are not "presented" to an employee of the United States, so long as those false claims are paid with taxpayer funds, as they were here. Pet. App. at 6a-8a, *quoting* 31 U.S.C. § 3729(c). To emphasize: It is undisputed that the funds used to pay the Petitioner subcontractors never belonged to the shipyards. The funds used to pay the Petitioner subcontractors were always taxpayer dollars, with the shipyards merely the conduit.

Next, the Sixth Circuit found that its decision to refrain from adding words to the FCA was fully supported by the 1986 legislative history. At that time, both houses of Congress expressed the identical intent for the newly-strengthened FCA and the freshly added definition of "claim." The Senate: "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." Pet. App. at 8a, *citing* S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275. And the House: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." Pet. App. at 8a-9a, *citing* H.R. Rep. No. 99-660, at 21 (1986).

Finally, the Sixth Circuit also held that its refusal to restrictively interpret the FCA was supported by the weight of authority. Starting many decades ago, this Court "has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly." Pet. App. at 15a, *citing United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541-42 (1943). Further, the Sixth Circuit found that this Court's decisions show that one of the primary purposes of the FCA "is to 'protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.'"

Pet. App. 15a, *quoting Neifert-White,* 390 U.S. at 233 (*quoting Rainwater v. United States,* 356 U.S. 590, 592 (1958)). Thus, the majority concluded, "the FCA covers all claims to government money, even if the claimant does not have a direct connection to the government." Pet. App. at 15a.[2]

Following the Sixth Circuit's decision, Petitioners sought rehearing and rehearing *en banc*, both of which were denied. Pet. App. at 62a-63. This Petition followed.

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[2] The dissenting opinion below would have affirmed the district court based solely upon the *dicta* logic in the *Totten* majority opinion. In so arguing, the dissent did not address the definition of "claim," the 1986 FCA legislative history, this Court's broad construction of the FCA, or the fact that *Totten* was not a case involving Section (a)(2) of the FCA and, moreover, never even mentions Section (a)(3) of the FCA.

ARGUMENT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE SIXTH CIRCUIT'S INTERPRETATION OF FCA SECTIONS (a)(2) AND (a)(3), AND THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENT.

A. Only One Other Circuit Court Has Addressed The "Presentment" Issue, And Its Ultimate Holding Is Fully Consistent With The Decision Below.

Petitioners argue that *certiorari* should be granted primarily because, according to Petitioners, there is an extensive circuit split on the "presentment" issue. Petitioners claim that as many as six other circuits have now scrutinized the matter (including the Sixth Circuit in this case), with four deciding (in "conflict" with the decision below) that "presentment" actually is impliedly part of Sections (a)(2) and (a)(3). Pet. at 11-18. This is simply incorrect. Beyond the Sixth Circuit in this case, only the District of Columbia Circuit has squarely addressed the "presentment" issue in its divided *Totten* decision. Proof of this is most starkly obvious from the decision below: Neither the majority nor the dissent found or acknowledged any circuit decision other than *Totten* that had previously examined or discussed "presentment."

In fact, the majority below paused to address and dispense with the inaccuracy of this exact assertion. Petitioners argued below, as they do again, that many

other circuits had both reached the "presentment" issue and decided that it was required in all sections of the FCA. After carefully reviewing and discussing each such case cited by the Petitioners, the majority quickly found and concluded – without disagreement from the dissent – that *Totten* was the only circuit court case preceding this one dealing with "presentment." Pet. App. at 18a-21a. The Sixth Circuit summarized: "At most, the cases cited by the defendants imply that the FCA contains a presentment requirement. None of the cases, however, address the precise issue before this court, and we find them unpersuasive in the present case." Pet. App. at 21a. Though Petitioners press the same discredited argument to this Court with some (but not all) different citations, the conclusion is the same. The circuit conflict claimed by Petitioners does not exist.

A cursory review of the four non-*Totten* "conflicting" cases cited by Petitioners reveals that they have nothing whatsoever to do with "presentment." Rather, they each involved a much more fundamental issue: Unlike this case, the relators could not identify any false claims at all, so the courts never inquired (nor was there any reason to inquire) about where or to whom the unidentified false claims may or may not have been "presented." With no false claims, the cases were either dismissed at the pleading stage (*United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir. 2006) and *United States ex rel. Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005)), on summary judgment (*United States ex rel.*

Quinn v. Omnicare, Inc., 382 F.3d 432 (3d Cir. 2004)), or by directed verdict (*United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 683 (10th Cir. 1998)).

In short, these alleged "conflicting" cases had nothing to do with the "presentment" issue squarely addressed in this case. None were cited by the Sixth Circuit as having addressed "presentment." None of the three cases decided after *Totten* (*Joshi*, *Corsello* and *Quinn*) even mentions *Totten* and its prior analysis of "presentment." And the cited case decided before *Totten* (*Aakhus*) was – even though Petitioners say it concerned the "presentment" issue – not cited by either the majority or dissent in *Totten*. Through out-of-context quotes from their "conflicting" cases, the Petitioners are trying to manufacture a dire circuit split where none in fact exists.

Even the supposed conflict with *Totten* is illusory, as the court below also correctly recognized. Unlike this case, *Totten* only involved claims under Section (a)(1), and throughout the six years of the *Totten* litigation at the trial court level, no party raised even the possibility that any other FCA section could have applied. *Totten*, 380 F.3d at 497-498. Only on appeal in *Totten* was Section (a)(2) first addressed, and then only as *dicta* in the debate regarding Section (a)(1) – with the *Totten* majority and dissent disagreeing on whether a literal "presentment" requirement in Section (a)(1) could be reconciled with the text of all parts of the FCA, including Section (a)(2) and the definition of "claim." The Sixth Circuit succinctly described the situation:

> In holding that § 3729(a)(2) contains a presentment requirement, the *Totten* court answers a question it was not asked. The primary issue before the court was whether claims submitted to Amtrak, a federal grantee receiving a portion of its funds from the government, constituted presenting a claim "to the Government." 380 F.3d at 490. There is no discussion of what it means to "present" a claim, and it is unclear from the opinion whether any evidence was put forth, as it was in this case, that the money used to pay the defendants came from the government (rather than from non-government funds). *See id.* As the majority states, none of the parties argued that subsection (a)(2) provided separate grounds for relief during six years of litigation, and the majority would not have even considered the subsection (a)(2) argument had the dissent not raised it *sua sponte*. *Id.* at 497. The subsection (a)(2) analysis seems to be almost an afterthought – not so much a *ruling* on the meaning of subsection (a)(2) as a *response* to the arguments made by the dissent on an issue not raised by the parties. *Id.* at 498. In making this response, the majority seems to have misread the plain language of the statute and its legislative history.

Pet. App. at 14a-15a.

As precedential value, then, *Totten*'s only holding is that Section (a)(1) requires "presentment" of a false claim directly to a Government employee to trigger

liability. Since the Sixth Circuit in this case reached the same conclusion, there is no true conflict with *Totten*. Instead, there exists only discord between the actual holding in this case regarding Section (a)(2) and some reasoning (though not a ruling) from *Totten*. And, regarding Section (a)(3), it is undisputed that neither *Totten* nor any other circuit court beyond the Sixth Circuit in this case has ever reached the issue of whether FCA Section (a)(3) requires "presentment."[3]

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[3] Petitioners cite a recent Seventh Circuit case as one that both reached the "presentment" issue and agreed with the Sixth Circuit's decision in this case. Pet. at 16, *citing United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006). We agree that *Crews* is consistent with the decision below, but *Crews* did not analyze the "presentment" issue at all, or cite any authority (such as this case or *Totten*). The Seventh Circuit affirmed dismissal of FCA claims involving Medicaid fraud because the Relator did not show how the Medicaid claims were false. *Crews*, 460 F.3d at 857. In so holding, the Seventh Circuit decided to "ignore" the Section (a)(1) allegations because Medicaid claims are never presented to the United States – they are "filed with and administered by" the various States (*Crews*, 460 F.3d at 856 n.1). *Crews* then reached the merits of the Section (a)(2) claims notwithstanding a lack of "presentment" of Medicaid claims to the United States. This is precisely what Congress wanted: "A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act[.]" S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (citation omitted). This statement of Congressional intent is irreconcilable with the Petitioners' assertion that "presentment" is required in Section (a)(2), which certainly explains why the Petition completely ignores the 1986 FCA legislative history.

In sum, the primary reason supporting Petitioners request for *certiorari* is based on misreadings of several circuit court decisions. There is no "extensive disagreement among the circuits" (Pet. at 17) regarding the "presentment" issue that even potentially warrants this Court's attention. Only two circuits have analyzed the topic, both agreed that Section (a)(1) requires "presentment," and only one rendered an actual binding decision on Sections (a)(2) and (a)(3) – holding that "presentment" should not be added where Congress had not done so.

B. The Decision Below Does Not Conflict With This Court's Precedent.

Petitioners' fall-back argument is that the Sixth Circuit's refusal to re-write the FCA to add a "presentment" requirement to Sections (a)(2) and (a)(3) amounts to a conflict with this Court's decision in a criminal case, *Tanner v. United States*, 483 U.S. 107 (1987). Petitioners did not so argue to the district court, to the panel below or to the entire Sixth Circuit in seeking *en banc* review. Nor did the *Totten* decision find *Tanner* applicable to the "presentment" issue in the slightest. Normally one would consider a circuit decision conflicting with this Court's precedent the primary reason advanced for seeking *certiorari*, rather than a secondary matter as it is in the Petition. But Petitioners are right not to rely too heavily on *Tanner*, for it is patently inapplicable and does not at all conflict with the decision below.

Tanner was not a civil FCA case, much less one that involved the proper reach of the FCA or the "presentment" issue. *Tanner* was a criminal case involving the proper reach of the Federal criminal conspiracy statute, 18 U.S.C. § 371. Petitioners claim that this Court's narrow construction of the Federal criminal conspiracy statute in *Tanner* mandates a similar narrow construction of the civil FCA in this case because there is "essentially identical" language at issue in *Tanner* as here. Pet. at 20.

It is generally ill-advised, under long-recognized cannons of statutory interpretation, to rigidly apply the mandates or structure of one Congressional statute to another, *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 813 (2003), or even to ascribe the same meaning to similar terms used in different statutes. *Environmental Def. v. Duke Energy Corp.*, 127 U.S. 1423, 1432 (2007). This is particularly true where Congress has stated policies and goals for one statute that are not the same as those for another statute, notwithstanding similar language. *Securities Industries Ass'n v. Board of Governors*, 468 U.S. 137, 174-175 (1983) (O'Connor, J., dissenting). Such is the case here.

In *Tanner*, the defendants conspired to defraud a private company of funds that were borrowed from a federally-financed bank and secured by a federal credit agency. *Tanner*, 483 U.S. at 110. The Government prosecuted the defendants under 18 U.S.C. § 371, which prohibits two or more people from conspiring "to defraud the United States, or any agency

thereof in any manner or for any purpose[.]" The Government argued for a broad construction of § 371 so that conspiratorial conduct aimed at recipients of federal financial assistance would be treated as against "the United States" for purposes of § 371. *Tanner*, 483 U.S. at 131.

This Court rejected the Government's suggested reading of § 371 for two main reasons. First, "the interpretation of § 371 proposed by the Government in this case has not even arguable basis in the plain language of § 371." *Tanner*, 483 U.S. at 131. Second, the Government's interpretation "has wrested no aid from § 371's stingy legislative history." *Tanner*, 483 U.S. at 131. Without support in the plain text or legislative history, this Court refused to adopt such a broad interpretation of a criminal statute.

The exact evidence of Congressional intent missing in *Tanner* is present regarding the civil FCA.[4]

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[4] The decisional framework in *Tanner* also cannot be comfortably applied in the civil FCA context because *Tanner* involved a criminal statute. As the *Tanner* Court itself repeatedly recognized, doubts about the reach of a criminal statute are construed in favor of narrow construction precisely because it concerns criminal penalties: "'If the legislative history fail[ed] to clarify the statutory language,' the Court observed, 'our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.'" *Tanner*, 483 U.S. at 131, *quoting Dixson v. United States*, 465 U.S. 482, 491 (1984) (additional citation omitted). In addition: "A criminal statute, after if not before it is judicially construed, should have a discernable meaning." *Tanner*, 465 U.S. at 132, *citing Dixson*, 465 U.S. at 512 (dissenting opinion).

In two powerful and undeniable ways, Congress expressed its intent that the FCA broadly reach fraudulent conduct aimed at recipients of federal dollars – rather than be limited to conduct aimed directly against the United States – so long as taxpayer funds are involved. First, of course, is the definition of "claim," ignored by Petitioners, which defines actionable "claims" to include those that are not presented directly to a Government employee:

> *Claim defined.* For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). In this case, the United States provided all the monies that were requested by the subcontractor Petitioners from the prime contractor shipyards.

Second, the legislative history of the 1986 FCA amendments is generous with statements that Congress meant the FCA to be broadly construed, not "stingy" as it was in *Tanner*, and specifically meant the FCA to apply to the conduct of subcontractors such as the Petitioners. In addition to the passages quoted above from the Senate and House that false

claims include those made to parties "other than the Government" (S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275; H.R. Rep. No. 99-660, at 21 (1986)), Congress also meant with the 1986 FCA amendments to broadly overrule judicial opinions that had "limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287, *citing United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981).

Petitioners in this case perpetrated fraud on the federal Government's prime contractor shipyards who paid Petitioners with taxpayer funds. Petitioners thereby perpetrated fraud on America's taxpayers. Congress identified this precise behavior as covered by the FCA.

Petitioners' reliance on *Tanner* as "conflicting" authority is therefore misplaced. Congress stated its intention to achieve with the FCA expansive protection for fraud practiced on the public fisc, whether direct or indirect. Congress did not state such an intention regarding the criminal conspiracy statute at issue in *Tanner*. The Sixth Circuit below correctly rejected the Petitioners' effort to achieve through the courts a limitation on the FCA that Congress determined to eliminate, and nothing in this Court's *Tanner* decision "conflicts" with or impacts that result in the least.

II. THE SIXTH CIRCUIT'S DECISION ADHERES TO THE PLAIN TEXT OF THE FALSE CLAIMS ACT, THE 1986 FCA LEGISLATIVE HISTORY AND THIS COURT'S PRECEDENT.

A. The Sixth Circuit Correctly Found That "Presentment" Is Not A Requirement Of Section (a)(2) Or Section (a)(3).

With no true circuit split or any "conflicting" opinion from this Court, Petitioners spend pages addressing the merits of the legal issue and repeating the arguments rejected in the court below. Pet. at 21-25. Though there is no apparent reason for rearguing the merits, since Petitioners' simple disagreement with the lower court decision is insufficient justification for this Court to grant *certiorari*, we briefly respond.

Curiously, Petitioners assert that the Sixth Circuit's opinion "disregards the plain language and legislative origins" of the FCA (Pet. at 21). Yet it is the Petitioners themselves who have done exactly that. The plain language of Section (a)(2) and Section (a)(3) is clear enough. "Presentment" does not appear in either.

Beyond avoiding the plain language, Petitioners nowhere cite or discuss the legislative history to the 1986 FCA amendments. And while the FCA's definition of "claim" is quoted in a footnote, Petitioners devote not a single word to reconciling their view that "presentment" of false claims to a Government official

is always required to trigger FCA liability even though the definition of "claim" says the opposite.

The decision below does not suffer these infirmities. It is based on a logical, straightforward application of classic statutory construction decisional framework, whereby the court examined the text of the FCA, its legislative history and interpretive caselaw. The result is entirely harmonious – the text, legislative history and caselaw all confirm that the FCA was meant to reach the conduct in this case. Pet. App. at 7a-18a.

In arguing for error below, Petitioners address only select portions of the Sixth Circuit's decision and reasoning, and thus do not acknowledge or resolve inconsistencies. Perhaps most notable, as they failed to do below, Petitioners still do not explain how the FCA definition of "claim" would have any meaning if "presentment" is engrafted into Sections (a)(2) and (a)(3). Petitioners note the "well-established cannon" of statutory construction against rendering any part of a statute superfluous (Pet. at 23, *citing Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)), yet Petitioners do precisely that. If all claims must be "presented" to a Government employee in order to trigger FCA liability, then the definition of "claim" – which, again, specifically says that actionable claims include those not presented to a Government employee – would become meaningless. By ignoring the contrary definition of "claim," Petitioners bypass this discord altogether.

Petitioners also never acknowledge that their goal (adding "presentment" in two places where Congress did not put it) is presumptively faulty. As the court below observed at length:

> The Supreme Court has consistently counseled against attributing the same meaning to different language in the same statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("We refrain from concluding [] that the differing language in two subsections has the same meaning in each.").

Pet. App. at 10a-12a (internal footnote omitted). Congress included "presentment" in Section (a)(1), but did not include it in Sections (a)(2) or (a)(3). Petitioners refuse to even consider that this decision is a strong, even dispositive indication of Congressional intent.

Focusing instead solely on the words of Section (a)(2), Petitioners say that "presentment" must be required in Section (a)(2) for two reasons. First, Section (a)(2) addresses false claims that are paid or approved "by the Government." Petitioners say that this phrase cannot merely mean that actionable false

claims must be paid with Government funds, because one part of the definition of "claim" – one part that Petitioners do not ignore – already requires that actionable false claims must be paid with Government funds. Pet. at 22. Thus, Petitioners say that "by the Government" must have another meaning, otherwise it would be superfluous. Pet. 22-23. The hidden meaning, for Petitioners, is that "by the Government" means that actionable false claims must be "presented" to the Government.

Petitioners' text-only focus fails because they have misread the definition of "claim." The definition of "claim" is a non-exhaustive list of the types of claims that may be actionable under the act, and merely "includes" claims paid with Government funds. 31 U.S.C. § 3729(c) (" 'claim' includes . . . ") The phrase "by the Government" in Section (a)(2) therefore is needed for the very reason that the definition of "claim" is not as effective as Petitioners suggest. "Claim" is not by definition limited to Government funds, so "by the Government" accomplishes that limitation in Section (a)(2). Thus is the FCA harmoniously construed.

Second, Petitioners say that a "presentment" requirement is needed in Section (a)(2) or else the explicit "presentment" requirement in Section (a)(1) would be "effectively nullifie[d.]" Pet. at 23. The reason, according to Petitioners, is that a relator unable to bring Section (a)(1) allegations where false claims were not "presented" directly to a Government employee would merely re-label the false claims as

"false records or statements" and bring the allegations under Section (a)(2). Pet. at 23-24. This illogically conflates the definition of "claim" with the definition of "record or statement."

The FCA definition of "claim" includes (but is not limited to) *any* request or demand, not merely those in the form of a "record or statement." And "claims" are certainly not always "records or statements." For instance, a claims process may be established to provide for regularly-scheduled payments that do not involve a separate implementing "record or statement" each time (e.g. monthly installment payments transferred electronically). These routine claims, if false, would be actionable under Section (a)(1) though not under Section (a)(2).

Moreover, distinctly different behavior is prohibited by Section (a)(1) and Section (a)(2), which makes these provisions obviously complimentary, and importantly so. Since "claims" are not necessarily "records or statements," the damage to the United States relating to submission of a false claim may differ from damage flowing from a false statement, and the number of civil penalties will vary also. *E.g. Bornstein*, 423 U.S. at 313. Thus, even if there is some overlap between Sections (a)(1) and (a)(2), they address different conduct and provide the United States with different and more comprehensive tools to fully redress fraudulent conduct.

In the end, while Petitioners' individual arguments to add "presentment" language to Sections

(a)(2) and (a)(3) each fail for a variety of reasons, the overriding theme and fundamental flaw is this: Petitioners are interpreting the FCA disjointedly to achieve a specific end, rather than harmoniously to give effect to all aspects of the statute and Congressional intent. Petitioners are thus proceeding exactly contrary to this Court's mandates: "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

Furthermore, a party "should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 133, *citing Brown v. Gardner,* 513 U.S. 115 (1994). While Petitioners clearly hope to manufacture a hole in the coverage of the FCA to allow subcontractors greater opportunity to pillage the public fisc, neither the language nor the legislative history nor the context of the FCA supports such effort.

Petitioners have carefully avoided placing their views of Section (a)(2) and (a)(3) in the context of the entire FCA statutory scheme. Thus have Petitioners ignored, rather than harmonized, parts of the FCA (as well as the legislative history) that conflict with adding "presentment" to Sections (a)(2) and (a)(3). The goal should be to give the FCA "a sensible

construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926). The court below did give a sensible and harmonious construction to the FCA that is indisputably consistent with clear and stated legislative purpose. There was no error.

B. The Sixth Circuit's Decision Does Not Raise New Issues But Instead Simply Reaffirms The Accepted Broad View Of The FCA.

Petitioners close their remarks with alarm that the Sixth Circuit's decision "will have profound consequences for the thousands of businesses that regularly perform subcontracting work on federally funded contracts." Pet. at 25. No it will not. The Sixth Circuit's decision, like the FCA itself, will only have consequences for the extreme minority of the Government's subcontractors – those who seek to obtain taxpayer funds through knowing fraudulent conduct.

Having failed to address the full text and structure of the FCA, and having completely ignored Congressional intent, Petitioners cast the Sixth Circuit's opinion as an outlier, one that "exposes subcontractors on federally funded contracts to onerous FCA liability in circumstances where Congress never intended the FCA to apply." Pet. at 21. Again,

the Sixth Circuit could not logically do anything to expose subcontractors to FCA liability. Subcontractors run afoul of the FCA by their own conduct. And the circumstances of this case involve the exact type of behavior that Congress explicitly intended the FCA to reach, and in force. After all, one of the stated reasons for the 1986 FCA amendments was to overturn judicial decisions that had "limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287 (citation omitted).

It is impossible to reconcile Petitioners' narrow interpretation of the FCA with the broad view of the FCA required by Congress and noted by this Court. So Petitioners pretend that the 1986 FCA legislative history doesn't even exist. Petitioners also refuse to address the broad view of this remedial statute consistently affirmed by this Court.

At one point, Petitioners suggest that fraud perpetrated by Government subcontractors on Government prime contractors should be remedied as a private matter between private parties under state law, since the subcontractors do not have direct contractual relations with the Government. Pet. at 26 (citations omitted). But this Court held almost 65 years ago that contract privity is irrelevant, since the FCA reaches all those who fraudulently obtain Government funds "without regard to whether that person had direct contractual relations with the

government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943).

Both Congress and this Court have thus stated plainly and repeatedly that fraud practiced against taxpayer money by Government subcontractors is not a private matter between private parties involving private funds. Petitioners' fraud in this case was indisputably practiced against taxpayer funds. The destroyers do not belong and have never belonged to the shipyards. The defective Gen-Sets do not belong and have never belonged to the shipyards. And it was not the shipyards' money that was misappropriated by Petitioners. The destroyers and defective Gen-Sets are the property of the Navy, and the money fraudulently obtained by Petitioners was taxpayer funds.

The simple truth is that the FCA was and always had been written and intended to protect the public fisc from fraudulent conduct throughout the procurement process, whether the fraudfeasors proceed directly or indirectly against taxpayer dollars. It has thus always been clear that the FCA reaches the conduct of Government subcontractors, such as the Petitioners in this case, who seek taxpayer funds from Government prime contractors despite knowingly failing to comply with critical contractual requirements for combat vessels. The Sixth Circuit merely restated this well-known rule. There is no need for this Court to do so also.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SCOTT A. POWELL
DON MCKENNA
HARE, WYNN, NEWELL
& NEWTON
The Massey Building, Suite 800
2025 Third Avenue, North
Birmingham, AL 35203
(205) 328-5330

JAMES B. HELMER, JR.*
PAUL B. MARTINS
ROBERT M. RICE
HELMER, MARTINS, RICE
& POPHAM CO., L.P.A.
600 Vine Street, Suite 2704
Cincinnati, OH 45202
(513) 421-2400

Counsel for Respondents
Relators Roger L. Sanders and Roger L. Thacker

**Counsel of Record*

REPLY BRIEF

68

FILED
OCT 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT U.S

No. 07-214

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

[Additional Counsel Listed on Inside Cover]

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

I. THE DECISION BELOW CONFLICTS WITH *TOTTEN* AND THREE OTHER CIRCUIT COURT DECISIONS 2

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *TANNER* 5

III. THE DECISION BELOW HAS PROFOUND PRACTICAL IMPLICATIONS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Seminole Tribe v. Florida,
517 U.S. 44 (1996).....3

Tanner v. United States,
483 U.S. 107 (1987).....2, 5, 7

United States v. Bornstein,
423 U.S. 303 (1976).....7

United States v. Gibbs,
704 F.2d 464 (9th Cir. 1983).....9

United States v. McNinch,
356 U.S. 595 (1958).....2, 8

United States ex rel. Atkins v. McInteer,
345 F. Supp. 2d 1302 (N.D. Ala. 2004).....5

United States ex rel. Brunson v. Narrows Health & Wellness, LLC,
469 F. Supp. 2d 1054 (N.D. Ala. 2007).....1

United States ex rel. Crews v. NCS Healthcare of Ill., Inc.,
460 F.3d 853 (7th Cir. 2006).....4

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943).....7

United States ex rel. McBride v. Halliburton Co., 2007 U.S. Dist. LEXIS 48112 (D.D.C. 2007).....3

United States ex rel. Quinn v. Omnicare Inc., 382 F.3d 432 (3d Cir. 2004).....4

United States ex rel. Taylor v. Gabelli,
345 F. Supp. 2d 313 (S.D.N.Y. 2004).....5

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004).....1, 3, 8

United States ex rel. Tyson v. Amerigroup Ill., Inc., 2005 U.S. Dist. LEXIS 24032 (N.D. Ill. 2005).....4

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000).....6

STATUTES

10 U.S.C. § 2306a 7

18 U.S.C. § 371 5

31 U.S.C. § 3729(a)(1) 4

31 U.S.C. § 3729(a)(2) 1, 4

31 U.S.C. § 3729(a)(3) 1, 5

31 U.S.C. § 3729(c) 7

OTHER AUTHORITIES

H.R. Rep. No. 99-660 (1986).....6

REPLY BRIEF FOR PETITIONERS

Confronted with a direct and acknowledged circuit split as to whether Sections 3729(a)(2) and (a)(3) of the False Claims Act ("FCA") include a "presentment" requirement (31 U.S.C. § 3729(a)(2), (a)(3)), respondents fall back upon unproven factual allegations and legal obfuscation in an effort to undermine the importance—and very existence—of this split. But no amount of factual or legal sleight of hand can obscure the fact that the Sixth Circuit's decision conflicts directly and explicitly with the D.C. Circuit's holding in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). Indeed, that split has been recognized not only by the United States, *see* Br. of the United States as *Amicus Curiae* at 10, *United States ex rel. DRC, Inc. v. Custer Battles, LLC* (4th Cir. filed June 8, 2007) (No. 07-1220) ("the Sixth Circuit has addressed the same presentment issue [as the D.C. Circuit in *Totten*] and has reached the diametrically opposite conclusion"), and by other courts, *see United States ex rel. Brunson v. Narrows Health & Wellness, LLC*, 469 F. Supp. 2d 1054, 1056 (N.D. Ala. 2007) ("the Sixth Circuit disagrees with the D.C. Circuit" in *Totten*), but also by the Sixth Circuit itself. *See* Pet. App. 10a ("We disagree with the *Totten* court's interpretation of the FCA for several reasons.").

Nothing in the opposition brief diminishes the existence of this split or the compelling need for this Court to resolve the question authoritatively. Respondents' primary argument—the far-fetched suggestion that the *Totten* court's treatment of the presentment issue under Section 3729(a)(2) should be dismissed as mere dicta—is belied by the D.C. Circuit's thorough, multipage analysis of the issue,

which was essential to its disposition of the case before it. Respondents' effort to distinguish this Court's holding in *Tanner v. United States*, 483 U.S. 107 (1987), is no more successful. The Sixth Circuit's conclusion that the FCA encompasses "false claims made to parties other than the government so long as the claim will be paid with government funds" (Pet. App. 9a) is directly at odds with *Tanner*'s holding that fraud directed at a federally funded private entity is not fraud against the United States. 483 U.S. at 129. Nor can the opposition brief conceal the profound practical implications of the Sixth Circuit's decision, which extends the FCA well beyond its intended purpose—combating "fraud practiced on the Government" (*United States v. McNinch*, 356 U.S. 595, 599 (1958))—to reach claims submitted to *any* private entity that receives federal funding, whether or not that claim is ever submitted to the federal government.

In light of the irreconcilable circuit split, the direct conflict with this Court's precedent, and the significant practical implications of the Sixth Circuit's decision, there is a compelling need for this Court to grant review.

I. THE DECISION BELOW CONFLICTS WITH *TOTTEN* AND THREE OTHER CIRCUIT COURT DECISIONS.

With no possibility of distinguishing the decision below from the D.C. Circuit's directly on-point decision in *Totten*, respondents seek to relegate to mere dicta the *Totten* court's holding that Section 3729(a)(2) includes a presentment requirement. But the implications of *Totten* cannot be so easily evaded. The Section 3729(a)(2) issue was an essential component of the D.C. Circuit's holding that the relator,

who brought suit under "§§ 3729(a)(1)-(a)(3)" of the FCA (*Totten*, 380 F.3d at 504 (Garland, J., dissenting)), could not pursue an FCA action based on allegedly false claims submitted to a federally funded private entity. The question whether Section 3729(a)(2) includes a presentment requirement was fully briefed by the parties and by the United States as *amicus curiae* (*id.*), and the *Totten* majority offered more than four pages of analysis to support its conclusion that presentment is required under Section 3729(a)(2) (*id.* at 498-502). The dissent devoted another twelve pages to the issue. *Id.* at 504-16.

Under any definition of the term, the *Totten* court's thorough exposition of the presentment question cannot be considered dicta. This Court has explained that, "[w]hen an opinion issues . . . , it is not only the result but also those portions of the opinion necessary to that result by which [a court] [is] bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). The *Totten* court's conclusion that liability can only be imposed under Section 3729(a)(2) where a claim has been presented to the government was certainly "necessary to [the] result" reached by the D.C. Circuit—that the plaintiff was foreclosed from pursuing an action under "§§ 3729(a)(1)-(a)(3)" of the FCA because the allegedly false claims had never been presented to the federal government.

For this reason, no court has *ever* suggested that *Totten*'s discussion of Section 3729(a)(2) is dicta. Indeed, district courts within the D.C. Circuit have recognized that they are bound by this aspect of *Totten*'s holding. *See United States ex rel. McBride v. Halliburton Co.*, 2007 U.S. Dist. LEXIS 48112, at *28-29 (D.D.C. 2007) ("FCA requires that false or fraudulent claims be presented to the government. This 'presentment' requirement may apply whether

the relator is proceeding on a theory of 'false claims,' 31 U.S.C. § 3729(a)(1), or of 'false records or statements,' *id.* § 3729(a)(2)" (citing *Totten*)). Similarly, a number of other courts—including the Sixth Circuit in the decision below—have expressly described *Totten*'s analysis of Section 3729(a)(2) as part of the case's holding. *See* Pet. App. 10a ("The [*Totten*] court next held that subsection (a)(2) also contains a presentment requirement."); *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 2005 U.S. Dist. LEXIS 24032, at *5 (N.D. Ill. 2005) ("*Totten* held, *inter alia*, that . . . presentment is a prerequisite to liability under both Subsections (a)(1) and (a)(2) of the FCA."); *see also* C.A. Br. for the United States as *Amicus Curiae* at 12 (*Totten* "h[e]ld[ ] that False Claims Act liability *always* requires presentment of a claim to a United States Government officer or employee").

Respondents' attempt to discount the relevance of the other circuit court decisions that have addressed the presentment issue under Sections 3729(a)(2) and (a)(3) is equally misplaced. Although *Totten* and the decision below include the most thorough treatment of the question, at least four other circuits have unequivocally staked a position on whether Sections 3729(a)(2) and (a)(3) include a presentment requirement. *Compare, e.g., United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 438 (3d Cir. 2004) ("In order to prove FCA liability under §§ 3729(a)(1) and (2), [a relator] must prove that . . . the defendant presented or caused to be presented to an agent of the United States a claim for payment.") (internal quotation marks omitted), *with United States ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 856 (7th Cir. 2006) (liability attaches under Section 3729(a)(2) whenever "the defendant made a statement in order to receive money from the

government" and the statement was knowingly false) (internal quotation marks omitted). These courts' conflicting conclusions reinforce the pressing need for this Court to provide an authoritative answer to this disputed question.[1]

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *TANNER*.

Respondents never dispute the fact that this Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987), construed a conspiracy statute with language virtually identical to Section 3729(a)(3) and concluded that a conspiracy to defraud the recipient of federal funds does not constitute a "conspir[acy] . . . to defraud the United States." *Id.* at 129.[2] Instead of attempting to distinguish the statutory lan-

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[1] Respondents are wrong to suggest that *Totten* and other decisions that confine their explicit analysis to Sections 3729(a)(1) and (a)(2) have no bearing on whether Section 3729(a)(3) includes a presentment requirement. Opp. Br. 17. Because Section 3729(a)(3) creates a derivative cause of action that imposes liability for conspiracies to violate Sections 3729(a)(1) and (a)(2) (*see United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 336 (S.D.N.Y. 2004)), decisions holding that Sections 3729(a)(1) and (a)(2) require presentment apply with equal force to Section 3729(a)(3). *See United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1304-05 (N.D. Ala. 2004) ("When *Totten* held that the direct presentation of a claim to a federal employee is required for stating an FCA claim, it follows that an agreement between two or more persons to present a fraudulent claim to [a state agency], a *grantee*, is not an actionable conspiracy under § 3729(a)(3)."), *aff'd*, 470 F.3d 1350 (11th Cir. 2006).

[2] *Compare* 31 U.S.C. § 3729(a)(3) (prohibiting "conspir[acies] to defraud the Government by getting a false or fraudulent claim allowed or paid"), *with* 18 U.S.C. § 371 (prohibiting "conspir[acies] . . . to defraud the United States . . . in any manner or for any purpose").

guage in *Tanner*, respondents seek to dispel the conflict between *Tanner* and the Sixth Circuit's holding by emphasizing that *Tanner* involved a criminal, rather than a civil, statute. Opp. Br. 20. But this Court has recognized that the FCA itself has many of the characteristics of a criminal statute. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) ("the FCA imposes damages that are essentially punitive in nature"). In any event, the criminal/civil distinction is meaningless because *Tanner*'s holding was not premised on any of the interpretive canons peculiar to the criminal setting but instead rested on the fact that "the interpretation of [18 U.S.C.] § 371 proposed by the Government"—that a conspiracy to defraud a federally funded private entity constituted a "conspir[acy] . . . to defraud the United States"—"ha[d] not even an arguable basis in the plain language of § 371." 483 U.S. at 131.

Respondents next attempt to distinguish *Tanner* by resorting to the legislative history of the 1986 FCA amendments. Opp. Br. 11, 21. The statements to which respondents refer, however, merely suggest that Congress did not limit the FCA's scope to false claims presented *directly* to the federal government but intended for the statute to extend to claims initially submitted to a federally funded private entity and then passed along to the government for payment or approval. *See, e.g.*, H.R. Rep. No. 99-660, at 21 (1986) ("claims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States"). Petitioners have never argued—and the D.C. Circuit in *Totten* did not hold—that a false claim must be presented directly to the government to give rise to FCA liability; where

a false claim submitted to a private party is subsequently presented to the government for payment or approval, the presentment requirement has been satisfied. *Cf. Tanner*, 483 U.S. at 132 (a defendant has "conspire[d] . . . to defraud the United States" where the defendant "conspired to cause [a federally funded private company] to make misrepresentations to the [federal government]").[3]

For this same reason, respondents' reliance on the FCA's definition of "claim" is also misplaced. *See* 31 U.S.C. § 3729(c). Like the legislative history on which respondents rely, that definition simply makes clear that the FCA encompasses claims submitted in the first instance to "a contractor, grantee, or other recipient" (*id.*); the plain language of Sections 3729(a)(2) and (a)(3) establishes that such a claim must subsequently be passed along to the government for payment or approval for FCA liability to attach. *See* Pet. for Writ of Cert. 21-25.

Ultimately, then, none of respondents' arguments can diminish the conflict between the Sixth Circuit's holding that the FCA reaches any claim "paid with government funds" (Pet. App. 9a) and this Court's significantly more narrow construction of an indistinguishable fraud provision in *Tanner*.[4]

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[3] For example, a subcontractor's claim for payment of a contract price negotiated in violation of the Truth in Negotiations Act, 10 U.S.C. § 2306a, would be covered by Section 3729(a)(2) if it were subsequently incorporated into the prime contractor's claim for payment to the government.

[4] Moreover, respondents' repeated attempts to derive support for the Sixth Circuit's interpretation of Sections 3729(a)(2) and (a)(3) from this Court's decisions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and *United States v. Bornstein*, 423 U.S. 303 (1976), are also unpersuasive because both of

III. THE DECISION BELOW HAS PROFOUND PRACTICAL IMPLICATIONS.

Respondents do not contest the fact that the Sixth Circuit's decision will vastly expand the scope of the FCA by extending the statute to any claim for payment submitted to a private company that receives federal funding. *See Totten*, 380 F.3d at 496 (the absence of a presentment requirement "would make the potential reach of the [FCA] almost boundless"). Relying upon unsubstantiated factual allegations that a jury has never found to be true and that are offered without record citation (Opp. Br. 1-6), respondents instead contend that application of the FCA is perfectly appropriate in this case because petitioners purportedly defrauded the higher-tier subcontractors and prime contractors with whom they worked. But the plain language and legislative origins of the FCA demonstrate that Congress designed the statute to remedy fraud directed toward the *federal government* (*McNinch*, 356 U.S. at 599) and that the statute was not intended to displace common-law fraud actions between private parties. Thus, far from attempting "to manufacture a hole in the coverage of the FCA" (Opp. Br. 28), petitioners are seeking this Court's review to ensure that the FCA—with its onerous civil penalty and treble-damages provisions, and incentive-distorting *qui tam* mechanism—does not swallow the state-law causes of action that are the traditional means of resolving allegations of fraud between private parties.

[Footnote continued from previous page]

those decisions involved the presentment of a false claim to the federal government. *See* Pet. for Writ of Cert. 21.

The significance of the Sixth Circuit's decision cannot be overstated. Not only does the decision expose businesses to potentially crippling FCA liability whenever they submit a claim for payment to a federally funded private entity—regardless of whether the claim is ever passed along to the government—it also exacerbates an existing circuit split and thereby fosters significant regulatory uncertainty for companies that do business across the United States. A company should not be subject to a vastly different interpretation of the FCA when it conducts business in the Sixth and Seventh Circuits, then when it does business in the Third, Eighth, Eleventh, and D.C. Circuits. Similarly, FCA actions litigated in these jurisdictions should be decided against a uniform legal backdrop. Only this Court can alleviate this legal and regulatory confusion.

The Sixth Circuit's decision also creates insuperable evidentiary problems for the steadily increasing number of FCA cases filed each year. *See* Pet. for Writ of Cert. 17-18. Because money is fungible, "it is difficult to prove whether specific . . . dollars from [an] account are federal or nonfederal." *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983) (per curiam). Accordingly, where a private company receives a portion of its funding from the federal government, it is often impossible to determine whether a specific claim was paid with those government funds or with money that it received from another source. In this case, for example, respondents failed to introduce any evidence indicating that the prime contractors kept their government funds segregated from private funds before payment was made to petitioners; it is therefore a profound overstatement for respondents to assert that it was "undisputed that every dime of the millions of dollars received by the

defendant subcontractors came from the United States Treasury." Opp. Br. 2. If this case proceeds to trial on remand, it is inevitable that a significant portion of the proceedings will be devoted to determining the precise source of the funds paid to petitioners—a daunting evidentiary inquiry that is a direct byproduct of the Sixth Circuit's holding in this case.

Because the presentment question decided by the Sixth Circuit is sharply disputed, frequently recurring, and exceptionally important, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

October 2, 2007

AMICUS CURIAE BRIEF

68

(3)

No. 07-214

FILED
SEP 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., et al.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN*
CAROLINE M. MEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file the attached amicus curiae brief in support of petitioners. Petitioners have consented to the filing of the brief. Respondents, however, have withheld consent, necessitating this motion.

The Chamber's brief is appropriate and will assist the Court in its consideration of this important case. The Chamber has a direct interest in this case, as many of its members are potentially subject to the False Claims Act ("FCA") and even more would be subject to the statute under the rule adopted by the Sixth Circuit in this case. The Chamber seeks to apprise the Court of the negative consequences to the nation's businesses if that decision is allowed to stand. The Sixth Circuit has held that the FCA can apply even to transactions between private parties where

no claim was ever presented to the federal Government, as long as the transaction involves funds traceable in some manner to the Government. As explained more fully in the Chamber's brief, this decision would not only increase the costs of transactions and litigation but also would make it more difficult for private businesses to resolve disputes on their own in a commercially reasonable manner. The FCA is properly applied to circumstances where the Government has suffered fraud practiced on it, but it should not be expanded to cover private transactions in which no false claim was ever presented to the Government.

This Court has routinely granted the Chamber leave to participate as an amicus curiae in FCA and other cases.[1] Leave to file should likewise be granted here.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN*
CAROLINE M. MEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amicus Curiae

---

[1] *See, e.g., Texaco Inc.* v. *Dagher*, Nos. 04-805, 04-814 (June 27, 2005); *BASF Corp.* v. *Peterson*, No. 04-81 (May 2, 2005); *American Trucking Associations, Inc.* v. *Michigan Public Serv. Comm'n*, Nos. 03-1230, 03-1234 (Jan. 14, 2005); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, No. 03-724 (Dec. 15, 2003); *Boeing Co.* v. *United States ex rel. Roby*, No. 02-1411 (June 27, 2003).

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR GRANTING THE WRIT	5
I. THE DECISION BELOW CREATES A DIRECT CIRCUIT SPLIT AND IS INCONSISTENT WITH THE LANGUAGE OF THE FCA	5
II. THE DECISION BELOW EXPANDS THE FCA FAR BEYOND ITS INTENDED PURPOSE AND INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE	7
A. The Sixth Circuit's Rule Dramatically Expands The FCA's Scope Beyond Government Fraud	8
B. The FCA's Draconian Penalties And Qui Tam Provisions Make It Important To Limit Its Reach To Actual Fraud Practiced On The Government	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES:

Corsello v. *Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) 6

Rainwater v. *United States*, 356 U.S. 590 (1958) 3, 7

Rex Trailer Co. v. *United States*, 350 U.S. 148 (1956) 11

United States ex rel. Crews v. *NCS Healthcare of Illinois, Inc.*, 460 F.3d 853 (7th Cir. 2006) 7

United States ex rel. Hagood v. *Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) 11

United States ex rel. Hopper v. *Anton*, 91 F.3d 1261 (9th Cir. 1996) 14

United States ex rel. Joshi v. *St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006) 6

United States ex rel. Quinn v. *Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004) 6

United States ex rel. Thompson v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997) 14

United States ex rel. Totten v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) ..... *passim*

United States ex rel. Virgin Island Housing Auth. v. *Coast General Constr. Servs. Corp.*, 299 F. Supp. 2d 483 (D.V.I. 2004) 11

United States v. *Advanced Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995) 11

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 11

TABLE OF AUTHORITIES—Continued

Page

***STATUTES*:**

31 U.S.C. § 3729(a) ..... *passim*

31 U.S.C. § 3730(b)(1) 9

31 U.S.C. § 3730(d) 12

***REGULATION*:**

28 C.F.R. § 85.3(9) (2006) 11

***LEGISLATIVE MATERIAL*:**

S. Rep. No. 99-345 (1986) 13

***OTHER AUTHORITIES*:**

Donald P. Arnavas, *Government Contract Guidebook* (3d ed. 2001) 9

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Government Accountability Office, *Information on False Claims Act Litigation* (Dec. 15, 2005) 12-13

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country.[1] One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief.

The Chamber and its members have a strong interest in this case. The petition raises a significant question regarding the applicability of the False Claims Act ("FCA") in situations where no false claim is actually presented to the federal Government. Many Chamber members are potentially subject to the terms of the FCA because they do business with the Government. But many more would be affected by the FCA if the Sixth Circuit's flawed decision is allowed to stand. In that decision, the court held that FCA liability can attach to any transaction where a claim is paid with funds traceable to the federal Government, even where the claim was never presented to the Government. That decision dramatically expands the FCA—including its potentially crippling penalties and provisions for suits by opportunistic "qui tam relators"—far beyond the statute's intended role of combating *government* fraud.

The Sixth Circuit's decision is inconsistent with the language and structure of the FCA, expands the statute's applicability far beyond its intended purpose of combating fraud on the Government, and is in direct conflict with the D.C. Circuit's decision in *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). The Chamber therefore urges the Court to grant certiorari to provide members of the business community with clear guidance on their potential exposure to FCA liability and to clarify the proper boundaries of the FCA.

SUMMARY OF THE ARGUMENT

The Sixth Circuit held that the False Claims Act—with its draconian penalties and intrusive qui tam relator provisions—applies to transactions between wholly private parties "so long as [a] claim will be paid with government funds." Pet. App. 9a. This unwarranted and dramatic extension of the FCA contravenes the statutory language, directly conflicts with the decisions of other circuits, and, if allowed to stand, would hinder the efficient commercial resolution of private disputes without any corresponding

benefit in combating actual fraud committed against the Government. Petitioners have already cogently explained why the Sixth Circuit's rule conflicts with the statutory language and with other decisions, most notably the D.C. Circuit's decision in *Totten*. The Chamber will not repeat those arguments here, but has filed this brief to further explain the negative consequences to the business community if the Sixth Circuit's decision is allowed to stand.

The FCA is aimed at combating "fraud against the government," regardless of "the form, or function, of the *government* instrumentality upon which such claims were made." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (emphasis added). The Sixth Circuit, however, has dramatically expanded the statute's scope to include alleged fraud practiced not on the Government, but rather on any entity that disburses funds that can be traced in some way to the Government. This expansion of potential liability would improperly bring the FCA to bear on private transactions that do not involve fraud practiced on the Government. For example, where the Government disburses grant funds to be used at the grantee's discretion, and the grantee is overcharged by a private supplier that is paid with the government grant funds, the Sixth Circuit's rule would allow a relator to sue the supplier under the FCA for allegedly overcharging the grantee, even where the Government played no role in paying the funds and even where the private parties are able to fully and satisfactorily resolve the issue between themselves. Interjecting the FCA into such private transactions will only increase burdens on businesses and provide windfalls to opportunistic relators, with no corresponding advancement of the FCA's purpose—combating fraud against the Government.

Expanding the FCA to reach any private transaction involving any funds traceable back to the Government would have further wide-ranging negative consequences for the business community. In its current version, the FCA

provides for potentially draconian statutory penalties of up to $11,000 per claim regardless of any damage to the Government, and thus has the potential to impose enormous liability unrelated to actual damages. Extending FCA liability to private transactions not involving the Government therefore will increase the costs of doing business as subrecipients of federal monies demand higher prices to account for the risk of unfounded FCA suits. Moreover, expanding the FCA to all transactions paid with government funds will hinder the ordinary mechanisms for the reasonable and expeditious resolution of contract disputes, as relators (or the Government if it intervenes) will interject themselves into private contractual relationships. The result will be an increase in and prolongation of costly litigation, as bounty-hunting relators look for windfalls even where the Government has suffered no fraud directed against it.

As the D.C. Circuit explained in *Totten*, the Sixth Circuit's rule "would make the potential reach of the Act almost boundless," as every transaction with any entity receiving federal funds would potentially be subject to the FCA. 389 F.3d at 496. The federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants. Under the Sixth Circuit's view that the FCA applies to any claim that "will be paid with government funds," Pet. App. 9a—even where the Government never knew of the claim—almost any alleged misstatement in a commercial transaction is potentially subject to the reach of the FCA's massive penalties as enforced by self-deputized qui tam relators. It is well-established that the FCA should not displace the ordinary mechanisms for policing compliance with regulatory violations. It is equally true that the FCA should not displace the ordinary mechanisms for policing compliance with the terms of private contracts where the Government is never presented with a false claim.

The Chamber does not condone misstatements or fraud wherever they may occur. But in circumstances where no

fraudulent claim is ever presented to the federal Government, common law and other state law remedies should govern and the severe penalties of the FCA should be reserved for circumstances where fraud has actually been practiced upon the Government. Given the direct split in the circuits, the widespread importance of the issue, and the serious negative consequences of the Sixth Circuit's erroneous ruling, this Court's review is warranted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A DIRECT CIRCUIT SPLIT AND IS INCONSISTENT WITH THE LANGUAGE OF THE FCA.

As explained more fully in the petition, the Sixth Circuit's holding that liability can attach under sections 3729(a)(2) and (a)(3) of the FCA simply by a showing that a claim was paid with government funds, without regard to whether the claim was ever presented to the federal Government for payment, is both inherently flawed and in direct conflict with the D.C. Circuit's decision in *Totten*, as well as decisions of the Third, Eighth, and Eleventh Circuits. The Court should grant review to reconcile this conflict and remove the legal uncertainty that now confronts all businesses that engage in transactions with recipients of federal funds.

In *Totten*, the D.C. Circuit held that both sections 3729(a)(1) and 3729(a)(2) require that an alleged false claim be presented to the federal Government as a condition to liability under the FCA. 380 F.3d at 492-502. The D.C. Circuit emphasized that subsection (a)(2) applies when a false record or statement is used to get a false claim "paid or approved *by the Government*," not simply when a claim is paid or approved by a recipient of federal funds. *See id.* at 498-99 (citation omitted). The court rejected the argument that the definition of "claim" in section 3729(c) extended section 3729(a)(2) liability to instances where federal money is paid out by grantees or other recipients of federal funds, because it would render the language "by the Government" in

subsection (a)(2) meaningless. *See id.* at 498. This reading of subsection (a)(2), the court explained, is consistent with the structure and content of the statute as a whole and with Congress's intent in amending the statute in 1982 and 1986. *See id.* at 498-501.

In this case, the Sixth Circuit expressly rejected the *Totten* court's holding. Pet. App. 10a, 15a. In the Sixth Circuit's view, the FCA applies to any claim that is "paid with government funds," Pet. App. 9a, regardless of whether the claim is ever presented to the federal Government. The court held that a jury is entitled to consider a claim under the FCA based solely on evidence "that all of the money paid to the defendants came from the United States government" and that the defendants knew that allegedly false claims "were paid using government funds." Pet. App. 24a. The majority made no analysis of what constitutes "government funds" where contractors receive funds from both government and commercial sources.

The D.C. Circuit's holding in *Totten* is consistent with decisions from the Third, Eighth, and Eleventh Circuits applying a presentment requirement to subsection (a)(2) and (a)(3).[2] Conversely, the Seventh Circuit is aligned with the Sixth Circuit in its willingness to extend liability under

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[2] *See United States ex rel. Quinn* v. *Omnicare Inc.*, 382 F.3d 432, 438 (3d Cir. 2004) (to establish liability under §§ 3729(a)(1) and (2), relator must prove that "the defendant presented or caused to be presented to an agent of the United States a claim for payment") (citation omitted); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (§ 3729(a)(3) "subjects to civil liability entities that * * * conspire to submit false claims to the government for payment or approval" and Fed. R. Civ. P. 9(b) requires relator to plead "what dates the defendants allegedly submitted the false claims to the government") (citations omitted); *Corsello* v. *Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005) (holding that "[t]he act of submitting a fraudulent claim to the government is the 'sine qua non of a False Claims Act violation'") (citation omitted).

section 3729(a)(2) of the FCA without regard to whether a claim was, in fact, presented to the United States. *See United States ex rel. Crews* v. *NCS Healthcare of Illinois, Inc.*, 460 F.3d 853, 856 n.1 (7th Cir. 2006) ("ignoring" relator's claim under § 3729(a)(1) because defendant had not filed any claim with an officer or employee of the United States but reaching merits of relator's claim under § 3729(a)(2) despite lack of presentment to the federal Government).

As explained in the petition, the Sixth Circuit's statutory analysis is fundamentally flawed, and improperly exposes any person or entity that receives money emanating from the federal Government—no matter how removed the transaction at issue is from the Government—to the harsh penalty provisions of the FCA. And in light of the current circuit split, persons and entities serving as subcontractors, subgrantees, or other subrecipients of federal funds face inconsistent exposure to these enhanced damage provisions of the FCA. The Court should grant certiorari to clarify the confusion created by these conflicting opinions, and to provide clear guidance to all persons and entities who may receive money from a recipient of federal funds about their potential exposure to this major federal law.

II. THE DECISION BELOW EXPANDS THE FCA FAR BEYOND ITS INTENDED PURPOSE AND INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE.

The intended target of the FCA is "fraud against the government." *Rainwater*, 356 U.S. at 592. Yet, under the Sixth Circuit's holding, claims submitted to private parties in the course of purely private transactions will also become actionable under the statute as long as any amount of what might be argued to be federal funds is doled out in response to the claim. The implications of such an extension of liability under the FCA are staggering. Companies doing business with federal contractors and grantees may find that what used to be only a private dispute about contract requirements can be

turned into a full-scale government investigation of improper claims, courtesy of an opportunistic relator eager to recover up to 30% of any award under the FCA. The balance of any such recovery would go to the Government, though it may never have had presented to it the claim that is the source of recovery. Extending FCA liability to any transaction touched by federal funds is contrary to the statutory text, and would create inefficiencies and complications that are not warranted based on any purported benefits. And because federal dollars permeate the national economy at all levels, the Sixth Circuit's decision will have far-reaching consequences.

A. The Sixth Circuit's Rule Dramatically Expands The FCA's Scope Beyond Government Fraud.

Eliminating a "presentment" requirement for claims asserted under sections 3729(a)(2) or (a)(3) of the FCA, and instead allowing FCA liability to attach to any transaction involving funds traceable to the federal Government, will inappropriately extend the FCA to many situations that do not involve true government fraud.

As Judge Batchelder recognized in her dissenting opinion below:

> [S]uppose [a] prime contractor has been bankrolled by the government and given full authority to pay claims without resort to government approval. The subcontractor's claim is actually paid "by the prime contractor," albeit with government funds. But, in bankrolling the prime contractor, the government did not act in response to the claim. The government may not even know that the subcontractor made a claim. The subcontractor's false statement did not induce the government to do anything.

Pet. App. 34a-35a. In such a scenario, there has been no fraud on the Government. Neither the language nor the purpose of the FCA supports extending liability to subcontractors, subgrantees, or any other entities that deal with a recipient of federal funds in such a situation.

Judge Batchelder's example is a very real concern. It is common for the Government to enter into fixed-price contracts under which it agrees to pay the prime contractor a set amount, regardless of the actual costs incurred by the contractor during performance of the contract. *See* Donald P. Arnavas, *Government Contract Guidebook* § 4.17 at 4-12 (3d ed. 2001). Fixed-price contracts "place the maximum risk on the contractor * * * and impose the minimum administrative burden on the Government." *Id.* (citation omitted). In such circumstances, if a subcontractor overcharges the prime contractor and the error is not caught, any additional funds improperly paid to the subcontractor will come out of the prime contractor's pocket, because the Government has not paid anything more under the fixed-price contract because of the inflated claim. And if the error is corrected, any repayment would be due the prime contractor, not the Government. In either event, the alleged false claim for payment is submitted to the contractor, not the Government. The Government never saw the claim and suffered no loss as a result of it.

The subcontractor in this example may or may not have acted fraudulently or breached its contract with the prime contractor. But in these circumstances, ordinary remedies are readily available to resolve the dispute. The prime contractor has every incentive to investigate and resolve any issues that may arise, and, in the event the parties cannot resolve a dispute consensually, common law and other state law remedies are available. Yet under the Sixth Circuit's rule, any stranger to the relationship may file a qui tam action under the FCA on behalf of the Government arguing that the transaction involved federal funds, even though the Government never saw the claim. In such circumstances, the parties would not be able to resolve the dispute on their own. *See* 31 U.S.C. § 3730(b)(1).

The Sixth Circuit's rule dramatically expands the reach of the FCA beyond those who actually deal with Government or

make claims against it to all transactions that can conceivably be traced to federal Government funds. As the *Totten* court recognized, the "effective" presentment approach now adopted by the Sixth Circuit "would make the potential reach of the Act almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." 380 F.3d at 496. As with the fixed-price contractor, if a federal grantee is allegedly overcharged by one of its own vendors but that overcharge has no effect on payments under the government grant, the vendor will nonetheless face the specter of a qui tam suit seeking punitive FCA liability for what would otherwise be a commercial matter to be resolved between the parties to the transaction.

The expansion of the FCA under the Sixth Circuit's rule is breathtaking. The federal Government spends more than $2.7 trillion per year, accounting for about 20% of the nation's entire gross domestic product. *See* Congressional Budget Office, *A 125-Year Picture of the Federal Government's Share of the Economy, 1950 to 2075* (2002) (www.cbo.gov/ftpdoc.cfm?index=3521&type=0&sequence=0). If FCA liability attaches whenever a claim "will be paid with government funds," even where it is never presented to the Government, Pet. App. 9a, the statute will thus be extended to billions of dollars' worth of private transactions. Particularly given the direct split in the circuits, a decision that would effectively federalize such an enormous swath of otherwise private transactions warrants this Court's intervention.

Moreover, as next shown, imposing such potentially "boundless" liability on anyone who touches any funds traceable to the federal Government would raise both transaction and litigation costs, benefiting opportunistic relators but adding little if anything to the fight against actual government fraud.

B. The FCA's Draconian Penalties And Qui Tam Provisions Make It Important To Limit Its Reach To Actual Fraud Practiced On The Government.

The liability facing a private company in a contract or other common law dispute with another private company is quantitatively and qualitatively different from the liability of a company facing an FCA claim. As this Court has recognized, "the current version of the FCA imposes damages that are essentially punitive in nature[.]" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (citation omitted). The statute provides for recovery of three times the amount of damages sustained by the Government plus a penalty of no less than $5,500 and as much as $11,000 for each claim. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9) (2006). "No damages need be shown in order to recover the penalty" under the FCA. *United States ex rel. Hagood* v. *Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (citing *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 n.5 (1956)); *see also, e.g.*, *United States* v. *Advanced Tool Co.*, 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995) (awarding $365,000 in penalties even though plaintiff failed to prove actual damages at trial), *aff'd mem.*, 86 F.3d 1159 (8th Cir. 1996); *United States ex rel. Virgin Island Housing Auth.* v. *Coast General Constr. Servs. Corp.*, 299 F. Supp. 2d 483, 491 (D.V.I. 2004) (awarding $50,000 in penalties where no actual damages to Government).

If, as often happens, the Government or a relator alleges that multiple similar false claims were made under a contract, the potential liability for statutory penalties will be enormous without regard to any harm allegedly suffered by the Government. Indeed, FCA cases can involve requests for penalties in the hundreds of millions of dollars. The amount sought in an FCA case will thus always exceed—and often far exceed—what could be sought in a traditional common law action. The statute contemplates such penalties where there has been fraud practiced on the Government through a

false claim that has been "paid or approved by the Government." 31 U.S.C. § 3729(a)(2). But extending this kind of potentially crippling punitive liability to all circumstances where a claim "will be paid with government funds," Pet. App. 9a, will result in increased costs to consumers and windfalls to potential relators, without a corresponding benefit in combating fraud practiced on the Government. If the potential for such extensive liability is extended to any company that receives federal funds in a transaction with another private entity, it will be natural for such companies to prepare for and mitigate the risk of exposure by increasing the costs for such products and services. It is at least debatable whether the Government would be well-served by such far-ranging increases in costs in circumstances where it never receives a false claim. But regardless, such massive liability should be reserved for those acts that truly constitute fraud on the Government—false claims presented to the Government for payment.

That is particularly true given the FCA's unique provisions allowing private qui tam relators to bring suits on behalf of the Government in circumstances where they would otherwise have no interest. Relators are entitled to between 25% and 30% of any recovery if the government does not intervene in the lawsuit, and between 15% and 25% of the recovery if the government does intervene. 31 U.S.C. § 3730(d)(1), (2). Successful qui tam relators are also entitled to seek recovery of attorneys' fees. *See id.* Because of these provisions, a cottage industry has grown up as attorneys and others seek to profit from these bounties.[3] In most qui tam cases, the Government elects not to intervene at all. *See* Government Accountability Office, *Information on False Claims Act Litigation* 29 (Dec. 15, 2005) (www.gao.gov/

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[3] As the banner of one qui tam website proclaims: "Collect Millions by Reporting Fraud." *See* Whistleblower Qui Tam Law Center, Whistleblower Lawsuits (www.whistleblower-qui-tam.com/pages/whistleblower-lawsuits.html).

new.items/d06320r.pdf) (between 1987 and 2005, the Government intervened in, or settled before intervening in, only 27.28% of all qui tam cases).

Although the FCA's qui tam provisions are conducive to abuse, they are predicated in part on the theory that relators can serve a purpose where the Government, due to its large outlays and sometimes limited investigatory resources, may have difficulty ferreting out fraud practiced on it. *See* S. Rep. No. 99-345, at 7-8 (1986). But that theory has little or no relevance to transactions between a subcontractor and prime contractor. Allowing FCA cases—including qui tam cases—to be brought against any company that deals with a recipient of federal funds will unnecessarily federalize what should be private contract claims. Without the FCA, parties will still have every incentive to investigate and resolve claims of contract non-compliance either consensually or through the usual common law remedies. Under the Sixth Circuit's reasoning, however, an opportunistic qui tam plaintiff could base an FCA complaint on the breach of a private contract provision between a federal grantee and its supplier or a contractor and its lower tier subcontractor, if the breach resulted in an allegedly false claim being paid by an entity that receives federal funds. If the FCA applies, the issue becomes much more difficult to resolve, because no settlement can be reached without the participation of the relator or the Government and because the potentially massive penalties increase a plaintiff's incentives to institute questionable litigation. Even if the parties seek to resolve the issue between themselves, the prospect of a qui tam FCA action would remain for years to come.

Federalizing these otherwise private contract disputes will thus hinder their resolution and prolong any litigation that may arise. And litigation would become much more expensive and difficult, given the FCA's complexity. Indeed, the Sixth Circuit's decision introduces yet more complexity, since it begs the question of what constitutes "federal funds."

As the *Totten* court recognized, "it remains unclear whether 'federal monies' * * * are still 'federal monies' when passed along to subgrantees or subcontractors, employees and suppliers of subgrantees and subcontractors, and so on." 380 F.3d at 502. Because all money is ultimately fungible, in many situations it will be difficult to develop a workable test as to whether a particular transaction does or does not involve federal funds triggering the FCA. By contrast, it is a relatively simply matter to determine whether a claim has been presented to the federal Government.

It is settled that the FCA should not be used to displace the normal mechanisms for enforcing compliance with federal regulations. *See, e.g., United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996). Likewise, the statute should not displace the normal mechanisms for addressing and resolving subcontractor claims that are never presented to the federal Government for payment.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN*
CAROLINE M. MEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amicus Curiae

JOINT APPENDIX

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115pgs
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FILED
DEC 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-214

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

JAMES B. HELMER, JR.
Counsel of Record
PAUL B. MARTINS
ROBERT M. RICE
HELMER, MARTINS, RICE & POPHAM CO., L.P.A.
600 Vine Street, Suite 2704
Cincinnati, OH 45202
(513) 421-2400

Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 17, 2007
CERTIORARI GRANTED OCTOBER 29, 2007

TABLE OF CONTENTS

Page

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit, No. 05-3502 ..... 1a

Relevant Docket Entries from the United States District Court for the Southern District of Ohio, No. 1:95-cv-00970-TMR-TSH 7a

Second Amended Complaint (May 30, 2000) 23a

Trial Transcript Excerpt (Feb. 10, 2005) 107a

General Docket
United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 05-3502
Filed: 04/29/2005
Termed: 12/19/2006
Nsuit: 1890 Other Statutory Actions
Sanders, et al v. Allison Engine Co, et al
Appeal From: Southern District of Ohio at Cincinnati

Case Type Information:
1) Civil
2) United States as party
3) Federal Question

Originating Court Information:
District: 0648-1 : 95-00970
Court Reporter: Leslie Foley
Court Reporter: Debbie Futtrell
Trial Judge: Thomas M. Rose, U.S. District Judge
Date Filed: 11/03/1995
Date NOA Filed: 04/11/2005
Date Order/Judgment: 03/17/2005

* * *

ROGER L. SANDERS; ROGER L. THACKER;

Plaintiffs – Appellants

UNITED STATES OF AMERICA

Plaintiff – Amicus Curiae

v.

ALLISON ENGINE COMPANY, INC.; GENERAL TOOL COMPANY; SOUTHERN OHIO FABRICATORS, INC.; GENERAL MOTORS CORPORATION

Defendants – Appellees

04/29/2005	Civil Case Docketed. Notice filed by Appellant Roger L. Sanders, Appellant Roger L. Thacker. Transcript needed: y
	* * *
12/28/2005	BRIEF filed by Steve Frank for Amicus Curiae USA. Copies 7. Certificate of service date 12/27/05. Number of Pages: 35. [05-3502]
12/28/2005	FINAL BRIEF filed by Glenn V. Whitaker, Victor A. Walton, Jr. for Appellees Southern Oh Fab, General Tool Co, Allison Engine Co. Copies: 7. Certificate of service date 12/27/05. Number of Pages: 65. [05-3502]

* * *

12/28/2005 FINAL BRIEF filed by James B. Helmer for Appellants Roger L. Thacker and Roger L. Sanders. Copies: 7. Certificate of service date 12/29/05 Number of Pages: 75. [05-3502]

12/28/2005 FINAL REPLY BRIEF filed by James B. Helmer for Appellants Roger L. Thacker and Roger L. Sanders. Copies: 7. Certificate of service date 12/28/05 Number of Pages: 37. [05-3502]

* * *

05/04/2006 BRIEF filed by Joseph E. B. White for Amicus Curiae Taxpayers Against. Copies 3. Certificate of service date 10/19/05. [05-3502]

05/12/2006 ORDER filed granting motion for amicus US to divide, with the appellants, the time allocated for appellant's oral argument. [3354184-1] filed by Steve Frank. Entered by order of the court.

06/02/2006 CAUSE ARGUED on 6/2/06 by James B. Helmer for Appellant Roger L. Thacker, Appellant Roger L. Sanders, Steve Frank for Amicus Curiae USA, Glenn V. Whitaker for Appellee Southern Oh Fab, Appellee General Tool Co, Appellee Allison Engine Co before Judges Batchelder, Gibbons,

Cook. [05-3502]

* * *

12/19/2006 OPINION filed : The decision of the district court in the Quality Case is REVERSED and the case is remanded for further proceedings not inconsistent with the opinion of this court. IT IS FURTHER ORDERED that the decision of the district court in the Pricing Case is AFFIRMED [05-3502], decision for publication pursuant to local rule 206 [05-3502]. Alice M. Batchelder, Circuit Judge, delivered a separate opinion concurring in part and dissenting in part, Julia S. Gibbons, Authoring Circuit Judge, Deborah L. Cook, Circuit Judge.

12/19/2006 JUDGMENT: The decision of the district court in the Quality Case is REVERSED and remanded, : The decision of the district court in the Pricing Case is AFFIRMED.

01/03/2007 PETITION for en banc rehearing filed by David P. Kamp for Appellee GMC, Glenn V. Whitaker for Appellees Southern Oh Fab, General Tool Co, Allison Engine Co, Lawrence R. Elleman for Appellee Southern Oh Fab, William A. Posey for Appellee General Tool Co. Certificate of service date 1/3/07. [05-3502]

* * *

02/16/2007 LETTER SENT by blh to Scott A. Powell and James B. Helmer for Appellants Roger L. Thacker, Roger L. Sanders notifying that they are directed to respond to a petition for en banc rehearing [3510149-1] filed by David P. Kamp, Glenn V. Whitaker, Lawrence R. Elleman, William A. Posey. Response due by 3/2/07. [05-3502].

02/28/2007 RESPONSE to a petition for en banc rehearing [3510149-1] filed by David P. Kamp, Glenn V. Whitaker, Lawrence R. Elleman, William A. Posey. Response filed by James B. Helmer for Appellants Roger L. Thacker, Roger L. Sanders. Certificate of service date 2/28/07. [05-3502]

* * *

04/20/2007 ORDER filed denying petition for en banc rehearing [3510149-1] filed by David P. Kamp, Glenn V. Whitaker, Lawrence R. Elleman, and William A. Posey [05-3502]. Alice M. Batchelder, Julia S. Gibbons, Deborah L. Cook, Circuit Judges.

04/26/2007 Appellee MOTION filed to stay mandate pending filing of petition for writ of certiorari. Motion filed by Glenn V. Whitaker for Appellee

Southern Oh Fab, Appellee General Tool Co, Appellee Allison Engine Co. Certificate of service date 4/26/07. [05-3502]

05/02/2007 ORDER filed granting motion to stay mandate [3574048-1] filed by Glenn V. Whitaker [05-3502]. Alice M. Batchelder, Circuit Judge, Julia S. Gibbons, Circuit Judge, Deborah L. Cook, Circuit Judge.

* * *

07/06/2007 Appellee MOTION filed to extend stay of mandate pending filing of petition for writ of certiorari. Motion filed by Glenn V. Whitaker for Appellee Southern Oh Fab, Appellee General Tool Co, Appellee Allison Engine Co. Certificate of service date 7/6/07. [05-3502]

07/26/2007 ORDER filed granting motion to extend stay of mandate [3616883-1] filed by Glenn V. Whitaker [05-3502]. Alice M. Batchelder, Circuit Judge, Julia S. Gibbons, Circuit Judge, Deborah L. Cook, Circuit Judge.

* * *

U.S. District Court
Southern District of Ohio (Cincinnati)
CIVIL DOCKET FOR CASE #:
1:95-cv-00970-TMR-TSH

United States ex rel
Roger L Sanders and
Roger L Thacker,
v. Allison Engine Company,
Inc, et al
Assigned to: Thomas M
Rose
Referred to: Magistrate
Judge Timothy S Hogan
Demand: $0
Member case: (View
Member Case)
Case in other court: Sixth
Circuit, 05-03502
Cause: 31:3729 False
Claims Act

Date Filed: 11/03/1995
Date Terminated:
03/17/2005
Jury Demand: Both
Nature of Suit: 890
Other Statutory Actions
Jurisdiction: U.S.
Government Plaintiff

* * *

Date Filed	#	Docket Text
11/03/1995	1	COMPLAINT & JURY DEMAND (Summonses issued) (Unsealed 5/5/99) (no. pgs: 21) (seal) Modified on 05/14/1999 (Entered: 11/06/1995)
11/03/1995	2	SEALED PROTECTIVE ORDER by Judge S. A. Spiegel; (cc: all counsel) (no pgs: 1) (seal) Modified on 05/13/1999 (Entered: 11/06/1995)

	* * *	
12/31/1998	26	NOTICE by USA of election to decline intervention (Unsealed 5/5/99) (seal) Modified on 05/14/1999 Entered: 01/04/1999)
01/07/1999	27	ORDER by Judge Herman J. Weber granting notice [26-1]; complaint & notice of election to decline intervention and this order shall be unsealed and served upon deft; file to remain under seal. (Unsealed 5/5/99) (cc: all counsel) (no pgs: 3) (seal) Modified on 05/14/1999 (Entered: 01/07/1999)
01/27/1999	28	AMENDED COMPLAINT by plaintiff (Unsealed 5/5/99) (seal) Modified on 05/14/1999 (Entered: 01/27/1999)
05/05/1999	29	NOTICE of Election to Decline Intervention by USA (Unsealed 5/5/99 (seal) Modified on 05/14/1999 (Entered: 05/10/1999)
	* * *	
05/05/1999	31	ORDER by Judge Herman J. Weber that original complaint, amended complaint, US notices of election to decline

		intervention, this Court's Order of 1/7/99 and this Order shall be unsealed and shall be served on defts; all other contents of this file shall remain under seal and not made public or served on defts in accordance with the terms of this order (cc: all counsel) (Unsealed 5/5/99) (no pgs: 2) (seal) Modified on 05/14/1999 (Entered: 05/10/1999)
	* * *	
07/06/1999	40	MOTION by defendant So OH Fabricators to dismiss (no pgs: 14+) (ph) (Entered: 07/06/1999)
07/06/1999	41	MOTION by defendant General Tool Co to dismiss amended complaint (no pgs: 14+) (ph) (Entered: 07/06/1999)
07/06/1999	42	MOTION by defendant General Motors Corp to dismiss amended complaint (no pgs: 12+) (ph) (Entered: 07/07/1999)
07/06/1999	43	MOTION by defendant Allison Engine Co to dismiss amended complaint (no pgs: 18+) (ph) (Entered: 07/07/1999)
07/30/1999	44	MEMORANDUM by plaintiffs in opposition to motions to

		dismiss amended complaint [41-1], [40-1], [43-1] & [42-1] (no pgs: 35+) (ph) (Entered: 08/02/1999)
08/13/1999	45	REPLY by defendant General Tool Co to response to motion to dismiss amended complaint [41-1], motion to dismiss amended complaint [42-1] (no pgs: 13) (ph) (Entered: 08/16/1999)
08/13/1999	46	REPLY by defendant So OH Fabricators to response to motion to dismiss [40-1] (no pgs: 10) (ph) (Entered: 08/16/1999)
08/13/1999	47	REPLY by defendant Allison Engine Co to response to motion to dismiss amended complaint [43-1] (no pgs: 26) (ph) (Entered: 08/16/1999)
08/13/1999	48	REPLY by defendant General Motors Corp to response to motion to dismiss amended complaint [41-1], motion to dismiss amended complaint [42-1] (no pgs: 11+) (ph) Modified on 08/17/1999 (Entered: 08/16/1999)
* * *		
03/29/2000	77	ORDER by Judge Herman J. Weber granting in part and

		denying in part motions to dismiss [40-1], [41-1], [42-1] & [43-1]; Relators shall have 60 days to submit an amended complaint which complies with the requirements of Rule 9(b); Relators' failure to submit an amended complaint will result in the dismissal of Count I. (cc: all counsel) (no pgs: 16) (ph) (Entered: 03/29/2000)
	* * *	
05/30/2000	80	AMENDED COMPLAINT by plaintiffs (no pgs: 81) (ph) (Entered: 05/31/2000)
	* * *	
06/30/2000	84	ANSWER to Second Amended Complaint by defendant So OH Fabricators; jury demand (no pgs: 17) (ph) (Entered: 06/30/2000)
	* * *	
07/07/2000	88	ANSWER to Second Amended Complaint by defendant General Motors Corp (no pgs: 22) (ph) (Entered: 07/11/2000)
07/07/2000	89	ANSWER to Second Amended Complaint by defendant Allison Engine Co (no pgs: 29) (ph)

		(Entered: 07/11/2000)
07/07/2000	90	ANSWER to Second Amended Complaint by defendant General Tool Co (no pgs: 30) (ph) (Entered: 07/11/2000)
	* * *	
11/28/2000	103	ANSWER to Relators' Amended Complaint (Originally filed in case C-1-99-923 as doc. 17) by defendant Allison Engine Co () (ph) (Entered: 11/29/2000)
11/28/2000	104	ANSWER to Amended Complaint (Originally filed in case C-1-99-923 as doc. 17) by defendant General Tool Co () (ph) (Entered: 11/29/2000)
11/28/2000	105	ANSWER to Amended Complaint (Originally filed in case C-1-99-923 as doc. 17) by defendant General Motors Corp () (ph) (Entered: 11/29/2000)
	* * *	
02/01/2005	625	Minute Entry for proceedings held before Judge Thomas M Rose: Voir Dire held on 1/31/2005. Jury seated and sworn in. (Court Reporter Leslie Foley.) (jg,) (Entered: 02/01/2005)

	* * *	
02/02/2005	627	Minute Entry for proceedings held before Judge Thomas M Rose: Jury trial held on 2/2/2005. (Court Reporter Leslie Foley and Debbie Futrell.) (jg,) (Entered 02/02/2005).
02/03/2005	628	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/2/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley.) (jg,) (Entered: 02/03/2005)
	* * *	
02/04/2005	631	Minute Entry for proceedings held before Judge Thomas M Rose: Witness Testimony taken exhibits offered. (Court Reporter Leslie Foley.) (jg,) (Entered: 02/04/2005)
02/04/2005	632	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/4/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Monna McCormick.) (jg,) (Entered: 02/04/2005)

*	*	*
02/07/2005	635	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/7/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/07/2005)
*	*	*
02/08/2005	637	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/8/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/08/2005)
*	*	*
02/09/2005	639	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/9/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 02/09/2005)
02/10/2005	640	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on

		2/10/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 02/10/2005)
02/11/2005	641	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/11/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/11/2005)
* * *		
02/14/2005	648	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/14/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/14/2005)
* * *		
02/15/2005	650	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/15/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/15/2005)

02/16/2005	651	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/16/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 02/16/2005)
02/17/2005	652	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/17/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley.) (jg,) (Entered: 02/17/2005)
* * *		
02/23/2005	653	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/22/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 02/22/2005)
* * *		
02/23/2005	654	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/23/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley /

		Therese Grycz.) (jg,) (Entered: 02/23/2005)
	* * *	
02/24/2005	660	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/24/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley.) (jg,) (Entered: 02/24/2005)
	* * *	
02/25/2005	661	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/25/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 02/25/2005)
	* * *	
02/28/2005	665	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 2/28/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Debbie Futrell.) (jg,) (Entered: 02/28/2005)
	* * *	

03/01/205	666	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 3/1/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Monna McCormick.) (jg,) (Entered: 03/01/2005)
* * *		
03/02/2005	668	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 3/2/2005. Witness testimony taken and exhibits offered. (Court Reporter Leslie Foley / Therese Grycz.) (jg,) (Entered: 03/02/2005)
03/04/2005	669	MOTION for Judgment as a Matter of Law *AS TO ALL FALSE CLAIMS ACT COUNTS* by Defendants General Motors Corp, Allison Engine Co, General Tool Co, So OH Fabricators. Responses due by 3/28/2005 (Whitaker, Glenn) (Entered: 03/04/2005)
* * *		
03/04/2005	671	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 3/3/2005. (Court Reporter

		Leslie Foley.) (jg,) Modified on 3/4/2005 to correct date trial held (jg,). (Entered: 03/04/2005)
03/04/2005	672	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 3/4/2005. (Court reporter Leslie Foley.) (jg,) (Entered: 03/04/2005)
03/07/2005	673	RESPONSE in opposition re 669 MOTION for Judgment as a Matter of Law *AS TO ALL FALSE CLAIMS ACT COUNTS* filed by Plaintiff Roger L Sanders. (Attachments: #1 Exhibit A, Dept of Justice Amicus Curiae Brief #2 Exhibit B, Dept of Justice Amicus Curiae Brief re Rehearing #3 Exhibit C, Dept of Justice Amicus Curiae Brief re Atkins #4 Exhibit PX 128, Part 1 #5 Exhibit PX128, Part 2) (Martins, Paul) (Entered: 03/07/2005)
03/07/2005	674	REPLY to Response to Motion re 669 MOTION for Judgment as a Matter of Law *AS TO ALL FALSE CLAIMS ACT COUNTS* filed by Defendants General Motors Corp, Allison Engine Co, General Tool Co, So OH

		Fabricators. (Whitaker, Glenn) (Entered: 03/07/2005)
03/07/2005	675	Supplemental Memorandum Supporting re 669 MOTION for Judgment as a Matter of Law *AS TO ALL FALSE CLAIMS ACT COUNTS regarding Implied Certification* filed by Defendants General Motors Corp, Allison Engine Co, General Tool Co, So OH Fabricators, General Motors Corp, Allison Engine Co, General Tool Co, So OH Fabricators. (Whitaker, Glenn) (Entered: 03/07/2005)
03/07/2005	676	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial held on 3/7/2005. (Court Reporter Leslie Foley.) (jg,) (Entered: 03/07/2005)
03/09/2005	677	Minute Entry for proceedings held before Judge Thomas M Rose: Jury Trial before Judge Thomas M Rose: Jury Trial completed on 3/8/2005. (Court Reporter Leslie Foley.) (jg,) (Entered: 03/09/2005)
03/11/2005	678	ENTRY AND ORDER GRANTING IN PART AND OVERRULING IN PART

		DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO ALL FALSE CLAIMS ACT COUNTS (669); FINDING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON RELATORS' DAMAGE ALLEGATIONS MOOT (670); FINDING DEFENDANTS' ORAL MOTION FOR JUDGMENT AS A MATTER OF LAW WITH REGARD TO PARAGRAPHS 159 AND 161 MOOT; OVERRULING DEFENDANT GENERAL TOOL COMPANY'S ORAL MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING RELATORS' RETALIATION CLAIMS; FINDING RELATORS' MOTION FOR RULE 54(b) CERTIFICATION MOOT (472) AND TERMINATING THIS CASE. Signed by Judge Thomas M Rose on 03/11/05. (mkb,) (Entered: 03/11/2005)
	* * *	
03/17/2005	679	AGREED ORDER OF DISMISSAL WITHOUT PREJUDICE OF RELATOR'S ROGER SANDERS' RETALIATION CLAIMS.

		Signed by Judge Thomas M. Rose on 3/16/05. (rp,) (Entered: 03/17/2005)
03/17/200	680	JUDGMENT in favor of Defendants against Plaintiffs; Relator's retaliation claims DISMISSED WITHOUT PREJUDICE under conditions agreed to by General Tool Company; Notice of Disposal attached. (rp,) (Entered: 03/17/2005)
	* * *	
04/11/2005	691	NOTICE OF APPEAL by Plaintiff Roger L Sanders. Filing Fee $ 255. (Martins, Paul) (Entered: 04/11/2005)
	* * *	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
MAY 30 2000
KENNETH J. MURPHY, Clerk
Cincinnati, Ohio

United States ex rel.	:	Civil Action No.
	:	C-1-95-970
	:	
ROGER L. SANDERS	:	Judge Herman J.
ROGER L. THACKER	:	Weber
c/o Helmer, Martins	:	
& Morgan Co., L.P.A.	:	Magistrate Judge
1900 Fourth & Walnut	:	Hogan
Centre	:	
105 E. Fourth Street	:	
Cincinnati, Ohio 45202	:	
	:	
Relators,	:	
	:	
BRINGING THIS	:	**SECOND**
ACTION ON BEHALF OF	:	**AMENDED**
THE UNITED STATES	:	**COMPLAINT**
OF AMERICA	:	
c/o Sharon J. Zealey	:	
United States Attorney	:	
220 U.S. Courthouse	:	
100 East Fifth Street	:	
Cincinnati, Ohio 45202	:	
	:	

and :
:
c/o Janet Reno :
Attorney General of the :
United States :
Department of Justice :
10th & Constitution :
Avenues, N.W. :
Washington, D.C. 20530 :
:
Plaintiffs, :
:
vs. :
:
ALLISON ENGINE :
COMPANY, INC. :
2355 S. Tibbs :
Indianapolis, IN 46241 :
Statutory Agent for :
Service: :
C.T. Corp. System :
One North Capitol :
Indianapolis, IN 46204 :
:
and :
:

GENERAL MOTORS :
CORPORATION :
3044 W. Grand Blvd. :
Detroit, MI 48202 :
Statutory Agent for :
Service :
The Corporation Trust :
Company :
Corporate Trust Center :
1209 Orange Street :
Wilmington, DE 19801 :
:
and :
:
GENERAL TOOL :
COMPANY :
Landy Lane :
Cincinnati, Ohio 45215 :
Statutory Agent for :
Service: :
William J. Kramer :
Landy Lane :
Cincinnati, Ohio 45215 :
:
and :
:

SOUTHERN OHIO :
FABRICATORS, INC. :
10333 Wayne Avenue :
Cincinnati, Ohio 45215 :
Statutory Agent for :
Service: :
Timothy J. Gates :
10333 Wayne Avenue :
Cincinnati, Ohio 45215 :
:
Defendants. :

INTRODUCTION

1. This Second Amended Complaint is filed pursuant to this Court's Order dated March 29, 2000. Doc. 77.

2. This is an action by *qui tam* Relators Roger L. Sanders and Roger L. Thacker in the name of the United States Government to recover civil penalties and damages arising from Defendants' false statements and false claims regarding the construction, testing, and reliability of generator sets ("Gen-Sets") installed or to be installed in United States Navy destroyers. Defendants routinely and with knowledge, acquiescence, and participation of other defendants, designed, constructed and delivered Gen-Sets to the United States Navy that were not in conformance with U.S. Government contract requirements and specifications. Defendants failed to perform inspections and tests as required by the contracts and falsified documents indicating that parts were manufactured to specifications and that inspections were performed. In fact, the Gen-Sets delivered to the United States Navy did not conform to Government requirements

due to faulty construction, inadequate or non-existent testing and inspection, lack of appropriate quality control procedures in the manufacturing process, and shoddy component parts which did not meet required specifications. Consequently, the Gen-Sets are unreasonably susceptible to malfunction or failure while in operation on United States Navy destroyers. As such, these Gen-Sets unnecessarily endanger the health and welfare of Navy personnel, especially in time of battle.

3. By failing to construct these Gen-Sets according to Government contract requirements, defendants have avoided the expense of corrective engineering, retrofitting existing Gen-Sets, replacing faulty components, and other costs.

4. Each United States Navy destroyer is outfitted with three Gen-Sets, each approximately 28.4 feet long, 7.8 feet wide and 10 feet in height. To date, over 33 United States Navy destroyers have been equipped with over 99 Gen-Sets. Repair costs alone are estimated to be in excess of $200 million for these faulty Gen-Sets that have already been installed in Navy destroyers.

PARTIES

5. Relator Roger L. Sanders is a resident of Ohio and a United States citizen. Mr. Sanders brings this civil action for violations of 31 U.S.C. § 3729(a)(1), (a)(2), and (a)(3), for himself and for the United States Government pursuant to 31 U.S.C. § 3730(b)(1). Mr. Sanders is a former employee of Defendant General Tool Company and was discharged on March 31, 1994 from his position with General Tool Company as a Project Coordinator and Spare Parts Administrator in violation of 31 U.S.C. § 3730(h).

6. Relator Roger L. Thacker is a resident of Ohio and a citizen of the United States. Mr. Thacker is a former employee of Defendant General Tool Company and brings this civil action for violations of 31 § 3729(a)(1), (a)(2), and (a)(3) for himself and for the United States Government pursuant to 31 U.S.C. § 3730(b)(1). In November 1995, Mr. Thacker was terminated from his job at General Tool Company in violation of 31 U.S.C. § 3730(h).

7. Defendant Allison Engine Company, Inc. ("Allison") is a Delaware corporation with its principal place of business in Indianapolis, Indiana. Between 1983 and 1993, while the series 9130 Gen-Sets were being built, an earlier corporate version of Allison was a division of Defendant General Motors Corporation. On December 1, 1993, Allison separated from Defendant General Motors and became an independent corporation. On March 24, 1995, Allison was acquired by Rolls-Royce PLC. Allison now operates as a separate corporate member of the Rolls-Royce Aerospace Group. All references to "Allison" in this Complaint includes the various corporate identities of Allison Engine Company, including the period of time when it was a division of Defendant General Motors Corporation. At all relevant times, defendant Allison was and is a subcontractor in the construction of Gen-Sets to be installed in United States Navy destroyers being built by the Government's prime contractors, Bath Iron Works and Ingalls Shipbuilding.

8. Defendant General Motors Corporation is a Delaware corporation doing business in this district. In April 1970, defendant General Motors Corporation acquired Allison Engine Company and made it a part of the Detroit Diesel Allison Division of General

Motors. In 1983, Allison became a separate division of General Motors Corporation where it remained until December 1, 1993, when Allison separated from General Motors and became an independent company. All references to "Allison" in this Complaint include defendant General Motors Corporation for the time period when defendant Allison was a division of General Motors Corporation.

9. Defendant General Tool Company ("GTC") is an Ohio corporation with its principal place of business in Cincinnati, Ohio. Defendant GTC is a subcontractor of Defendant Allison in the manufacture and assembly of the Gen-Sets for the United States Navy destroyers.

10. Defendant Southern Ohio Fabricators, Inc. ("SOFCO") is an Ohio corporation with its principal place of business in Cincinnati, Ohio. Defendant SOFCO is a subcontractor in the construction and fabrication of the base assembly, enclosures, and component parts for the Gen-Sets to be installed in United States Navy destroyers pursuant to Government contract.

11. All Defendants are tier subcontractors for the construction of Gen-Sets to be installed in United States Navy destroyers.

JURISDICTION AND VENUE

12. This action arises under the False Claims Act, 31 U.S.C. § 3729 *et seq*.

13. Jurisdiction over this action is conferred upon this Court by 31 U.S.C. § 3732(a) and 28 U.S.C. § 3130 in that this action arises under the laws of the United States.

14. Venue is proper in the United States District Court for the Southern District of Ohio, Western Division, pursuant to 28 U.S.C. § 1391(b) and (c) and 31 U.S.C. § 3732(a) because defendants Allison, GTC and SOFCO reside in and transact business in this District and many of the facts that form the basis for this Complaint, including the assembly and construction of the Gen-Sets, occurred in this District.

FACTUAL ALLEGATIONS

I. CONTRACTUAL REQUIREMENTS FOR GEN-SET CONSTRUCTION

A. Overview

15. In 1985, the United States Navy began ordering newly manufactured Navy guided missile destroyers from two prime-contractor shipbuilders: Bath Iron Works Corporation ("Bath") and Ingalls Shipbuilding, Inc. ("Ingalls"). In order to ensure the quality of these new destroyers, the Navy mandated in its contracts that Bath and Ingalls follow a series of regulations, military specifications (MIL-Specs), design specifications and other contractual provisions regarding every aspect of destroyer construction. According to the design requirements, each of these destroyers is to be equipped with three on-board generators to supply the electrical power for all aspects of ship functions: These generators, or "Gen-Sets," were supplied to Bath and Ingalls through a series of subcontracts with defendants Allison, GTC and SOFCO.

16. The Government requirements regarding the Gen-Sets are imposed upon Allison, GTC and SOFCO by the various contracts and Purchase Orders issued under the Gen-Set program. The

Government requirements thus flow from it down to and through each subcontractor tier used for the fabrication of the Gen-Sets: first to Bath and Ingalls, and, in turn, to Allison, GTC, and SOFCO.

17. In connection with delivery of completed destroyers to the Navy, Bath and Ingalls certify that the ships conform to the Government specifications contained in the prime contracts. By this process, Bath and Ingalls are also certifying that the Gen-Sets installed in the destroyers conform to applicable Government specifications.

18. Bath and Ingalls purchase the Gen-Sets from Allison and, in order to satisfy its contractual obligations to the Government regarding the manufacture of the Gen-Sets, impose upon Allison a series of requirements—as detailed in its Purchase Orders—for Gen-Set construction. In connection with the delivery of the completed Gen-Sets to Bath or Ingalls, Allison certifies that the Gen-Sets conform to the specifications outlined in the Purchase Orders issued to it from Bath and Ingalls.

19. Allison hired defendant GTC to assemble the component parts of the Gen-Set into a completed unit. Allison provides its own gas turbine engine for use in the Gen-Sets, and purchases many other component parts and ships them to GTC for use in the Gen-Sets. GTC makes or subcontracts for the remainder of the component or piece parts needed for the Gen-Sets. GTC then assembles all of these parts into a completed and "packaged" Gen-Set.

20. Allison, by Purchase Order and incorporated Statement of Work ("SOW"), imposes certain requirements on GTC in order to fulfill its obligations to Bath and Ingalls. In connection with the delivery of the completed Gen-Sets for

installation in the Navy destroyers, GTC certifies that the Gen-Sets conform to the specifications outlined in the Purchase Orders and SOW issued to it from Allison.

21. Allison personnel are routinely present at GTC's Cincinnati facility, assisting in and observing quality control, testing, and other aspects of Gen-Set construction. Allison personnel regularly assigned to GTC include the Allison Project Engineers, Quality Assurance Managers, and Project Managers.

22. Each completed Gen-Set is housed in a base and enclosure assembly, many of which were purchased by GTC from defendant SOFCO. GTC imposed by Purchase Order certain requirements on SOFCO for the construction of these Gen-Set base and enclosure assemblies in order to fulfill its obligations under the Allison Purchase Order. In connection with the delivery of the base and enclosure assemblies to GTC for use in the construction of the Gen-Sets, SOFCO certified that the Gen-Set base and enclosure assemblies conformed to the specifications outlined in the Purchase Orders issued to it from GTC.

23. At all relevant times, Allison, GTC and SOFCO knew that the subcontracts or Purchase Orders under which they produced Gen-Sets or Gen-Set components were part of a Federal contract to produce Navy destroyers.

24. At all relevant times, Allison, GTC and SOFCO knew that their claims for payment were being made under subcontracts or Purchase Orders paid for by funds derived from the United States for Navy destroyers.

25. At all relevant times, Allison, GTC and SOFCO knew that they were obligated to follow the Government requirements contained in Purchase Orders issued to them relating to the Gen-Set project. Indeed, Allison, GTC and SOFCO acknowledged this every time they certified that their work on the Gen-Set program conformed to all applicable Government requirements, and impliedly certified compliance with every invoice/claim for payment submitted pursuant to the Purchase Orders.

26. Though Allison, GTC and SOFCO routinely performed work on the Gen-Set project that was not in compliance with the requirements contained in Purchase Orders or SOW issued to them, they continually certified, expressly and impliedly, that all such work did, in fact, comply with all such requirements. When these nonconforming Gen-Sets were installed by Bath and Ingalls in new Navy destroyers, and when these destroyers were delivered to the Navy, the United States was not receiving a ship that complied with Government contract specifications. When Bath and Ingalls submitted claims for payment to the Government for Navy destroyers that contained nonconforming Gen-Sets, such claims were false. More importantly, when Allison, GTC and SOFCO submitted claims for payment under their respective Purchase Orders, such claims were knowingly false. Thus did Allison, GTC and SOFCO knowingly submit, or cause to be submitted, false claims for payment to the Government in violation of the False Claims Act.

B. The Prime Contracts For The Navy Destroyers

27. On April 2, 1985, the United States Navy awarded to Bath contract number N-00024-85-C-2144 for the construction of the first in a series of new United States Navy guided missile destroyers. This contract, the "lead shipyard contract," was for the construction of the lead ship, the DDG-51, USS Arleigh Burke (in the "DDG" label, the "DD" designates the ship class as a destroyer while the "G" designates the ship as one whose main armament is guided missiles). The United States Navy has already made or ordered over 50 of these new Arleigh Burke class guided missile destroyers.

28. On May 26, 1987, the United States Navy awarded to Ingalls contract N-00024-87-C-2256 for the construction of the second in this series of new United States Navy guided missile destroyers, the DDG-52, USS Barry.

29. Bath, the "lead shipyard," was required by its contract to:

> conduct tests and trials, deliver the ship fully outfitted, and develop drawings and other technical documentation all in conformity with this contract including Ship Specifications. The Contractor shall validate construction documentation, perform special studies, and provide logistics and support equipment and services. In addition, the Contractor shall furnish all of the facilities, manpower, quality assurance, inspection, test facilities and management organization and control required for construction of DDG 51 in

> accordance with the requirements of this contract including the Ship Specifications.

Contract N-00024-85-C-2144, ¶ C.1.

30. Ingalls, the "follow shipyard," was bound by these same requirements to:

> conduct tests and trials, deliver the ship(s) fully outfitted and develop technical documentation all in conformity with this contract, including the Ship Specifications (Attachment J-2 [to the contract]). The Contractor shall perform special studies and provide logistics and support equipment and services. In addition, the Contractor shall furnish all of the facilities, services, manpower, quality assurance, inspection, test facilities and management organization and control required for management of and construction of the ship(s) in accordance with the requirements of this contract including Ship Specifications.

Contract N-00024-87-C-2256, ¶ C.1.

31. Since awarding these first two contracts to Bath and Ingalls, the United States Navy has awarded several more contracts to these two ship builders for the continued production of new Arleigh Burke class guided missile destroyers. The following is a list of Government contracts issued to either Bath or Ingalls for Navy destroyers during the time that Relators Sanders or Thacker worked for GTC:

GOV'T CONTRACT # YEAR	SHIPYARD	NAVY DESTROYERS (DDGS)
N-00024-85-C-2144 (1985)	BATH	51
N-00024-87-C-2256 (1987)	INGALLS	52
N-00024-87-C-2257 (1987)	BATH	53
N-00024-89-C-2033 (1989)	BATH	54, 56, 58
N-00024-89-C-2034 (1989)	INGALLS	55, 57
N-00024-90-C-2800 (1990)	INGALLS	59, 61, 63, 65, 67
N-00024-90-C-2801 (1990)	BATH	60, 62, 64, 66
N-00024-92-C-2800 (1992)	INGALLS	69, 71
N-00024-92-C-2805 (1992)	BATH	68, 70, 72
N-00024-93-C-2800 (1993)	BATH	73, 75, 76
N-00024-93-C-2806 (1993)	INGALLS	74, 78, 80, 82
N-00024-94-C-2808 (1994)	BATH	77, 79, 81

32. On information and belief, the United States Navy continued, after Relators Sanders and Thacker were terminated from their employment at GTC in March, 1994 and November, 1995, respectively, to award contracts to Bath and Ingalls for the construction of new destroyers up to and including ship DDG-107.

33. All of these Navy contracts with Bath and Ingalls impose a series of requirements for construction of all aspects of the new destroyers, and specifically incorporate a document entitled "Ship Specifications." The Ship Specifications require that each new destroyer be outfitted with three generators as power source for all ship functions beyond propulsion.

34. Under the terms of these prime contracts, including the attached Ship Specifications, Bath and Ingalls are required, among other things, to develop and follow specific drawings for destroyer construction. Bath and Ingalls are also required to comply with the quality and inspection requirements of MIL-Q-9858A, entitled "Quality Program Requirements."

35. In connection with the delivery of the completed Navy destroyers and any payments related thereto, Bath and Ingalls must explicitly certify that the ships conform to all Government contract requirements.

C. Bath And Ingalls Purchase Orders To Allison

36. Bath and Ingalls subcontracted with Allison for the purchase of the Gen-Sets. The following is a list of Purchase Orders issued by Bath and Ingalls to Allison, during the time that Relators Sanders or Thacker worked for General Tool Company, for the purchase of Gen-Sets numbered 1 through 98, covering destroyers numbered DDG-51 through DDG-82:

PURCHASE ORDER NUMBER	PRIME CONTRACTOR	SHIP (DDG NUMBER)
450-125-M	BATH	51
J6-03019-011	INGALLS	52
451-125-M46	BATH	53
452-125-M46	BATH	54, 56, 58
L1-03019-11	INGALLS	55, 57
M2-03019-011	INGALLS	59, 61, 63, 65, 67
455-125-M46	BATH	60, 62, 64, 66
459-125-M46	BATH	68, 70, 72
N9-03019-011	INGALLS	69, 71
462-125-M46	BATH	73, 75, 76, 77, 79, 81
R1-03019-011	INGALLS	74, 78, 80, 82

37. On information and belief, since the time Relators Sanders and Thacker were terminated from their employment at General Tool Company in March, 1994 and November, 1995, respectively, Bath and Ingalls have awarded Purchase Orders to Allison for the construction of Gen-Sets up to and including Gen-Sets for Navy destroyer DDG-107.

38. Pursuant to its obligations under its contract with the United States, Bath developed Procurement Specification 450-310-01A in order to ensure that its subcontractors complied with all applicable Government contract specifications.

39. Each Bath and Ingalls Purchase Order issued to Allison requires that the Gen-Sets be manufactured, tested and delivered in strict accordance with Bath Procurement Specification Number 450-310-01A.

40. Under the terms of the Bath and Ingalls Purchase Orders, including the terms of Bath Procurement Specification Number 450-310-01A, Allison was required, among other things, to do the following regarding Gen-Set construction:

a) adhere to military specifications MIL-Q-9858A ("Quality Program Requirements") and MIL-45208A ("Inspection System Requirements");

b) adhere to the requirements contained in Allison's Supplier Quality Manual;

c) adhere to the requirements called for in the prints and drawings associated with Gen-Set construction; and

d) certify that the delivered Gen-Sets conform to all Purchase Order requirements.

D. Allison Purchase Orders To GTC

41. Beginning in March, 1988, Allison subcontracted with defendant General Tool Company for the "packaging" of the Gen-Sets and fabrication of many of the Gen-Set component parts. GTC was thus the Government subcontractor that primarily constructed and assembled the completed Gen-Sets.

42. For the first three Gen-Sets, Allison subcontracted with an additional company, Williams and Lane, regarding the "packaging" of the Gen-Sets. Williams and Lane was responsible for overseeing the construction and assembly of the completed Gen-Sets and purchasing various component and piece parts.

43. Beginning with Gen-Set Unit number 4, Allison no longer subcontracted with Williams and Lane regarding the Gen-Set project. Instead, GTC

was thereafter responsible for all aspects of Gen-Set construction and quality control, as called for in Allison's future Purchase Orders.

44. Though individual Bath and Ingalls Purchase Orders to Allison often ordered Gen-Sets for multiple new Navy destroyers, individual Allison Purchase Orders to GTC usually covered only one named DDG destroyer—and thus covered only three Gen-Sets per Purchase Order. The most notable exception to this practice was in Allison's ordering of the first 10 Gen-Sets, which was accomplished by a single Purchase Order issued to GTC. As noted above, Allison had an additional separate contractual arrangement with Williams and Lane regarding the first 3 Gen-Sets.

45. During the time that Relators Sanders or Thacker worked for General Tool Company, Allison issued the following Purchase Orders to GTC for the purchase of Gen-Sets numbered 4 through 98, covering destroyers numbered DDG-51 through DDG-82:

ALLISON PURCHASE ORDER	**GEN-SETS NUMBERS**
H824036	1 through 10
H926546	11, 12, 13
H926642	14, 15, 16
H926643	17, 18, 19
H926644	20, 21, 22
H926645	23, 24, 25
H025249	26, 27, 28
H127311	29, 30, 31
H127312	32, 33, 34
H127313	35, 36, 37
H127314	38, 39, 40

H127348	41, 42, 43
H127349	44, 45, 46
H127350	47, 48, 49
H127351	50, 51, 52
H205948	53, 54, 55
H205949	56, 57, 58
H205950	59, 60, 61
H205951	62, 63, 64
H205952	65, 66, 67
H319865	68, 69, 70
H319866	71, 72, 73
H319867	74, 75, 76
H319868	77, 78, 79
H5O5983	80, 81, 82
H5O5984	83, 84, 85
H5O5985	86, 87, 88
H5O5982	89 (SPARE)
H5O6040	90, 91, 92
H5O6041	93, 94, 95
H5O6042	96, 97, 98

46. On information and belief, Allison continued to issue Purchase Orders to GTC for the construction of Gen-Sets up to and including Gen-Sets for Navy destroyer DDG-107 after Relators Sanders and Thacker were terminated from their employment at General Tool Company in March, 1994 and November, 1995, respectively.

47. Under the terms of each Purchase Order issued by Allison to GTC for the construction of Navy Gen-Sets, GTC must, among other things:

a) manufacture the Gen-Sets in conformance with the specifications, blue prints, and drawings for the Gen-Sets;

b) maintain records regarding its manufacturing and inspection process for a period of 7 years;

c) comply with the requirements set forth in General Tool Company's Quality Assurance Manual;

d) comply with the requirements set forth in Allison's Supplier Quality Manual;

e) comply with the requirements set forth in Allison's Statement of Work;

f) comply with the requirements contained in the Terms of Business Agreement Between Allison and GTC;

g) comply with all other requirements of military specifications MIL-I-45208A, MIL-STD-45662A and MIL-Q-9858A, the most stringent Quality Assurance and Inspection criteria in the manufacturing industry; and

h) submit a certification of conformance in connection with the completed Gen-Sets stating that all Purchase Order requirements have been met.

48. Among other things, Allison's Supplier Quality Manual, Statement of Work and Terms of Business Agreement between Allison and GTC require the following from General Tool Company regarding the manufacture of Navy Gen-Sets:

a) all drawing requirements must be followed;

b) GTC must maintain an inspection system to ensure that it is following all specifications and drawing requirements in accord with MIL-Q-9858A;

c) GTC must maintain an inspection system to ensure that its subcontractors are following all specifications and drawing requirements and that each subcontractor has a documented quality control program;

d) GTC must establish, maintain, date, sign and make available for review by Allison written procedures covering all phases of Gen-Set construction, including initial planning, blueprint and specification control, subcontractor control, material handling, inspection function, sampling, gage control, software, shipping, corrective action, and records;

e) GTC must submit a formal request to Allison every time it wants to change prints and drawings regarding Gen-Set construction; and

f) GTC must inspect all material purchased from subcontractors to ensure that such material conforms to all Allison requirements.

E. GTC Purchase Orders to SOFCO

49. Each completed Gen-Set is housed in a base and enclosure assembly. GTC subcontracted with SOFCO for the construction of these base and enclosure assemblies for Gen-Set units 4 through 79. Beginning with Gen-Set number 80, GTC began making the base and enclosure assemblies and SOFCO was no longer involved in the Gen-Set program.

50. During the time that Relators Sanders or Thacker worked for General Tool Company, GTC issued the following Purchase Orders to SOFCO for

base and enclosure assemblies for the indicated Gen-Set numbers:

GTC PURCHASE ORDER	GEN-SET NUMBERS
0068T9109	4 through 10
9286A4300	11 through 25
578-00	26 through 40
636-00	41 through 52
5654-00	53 through 67
11064-00	68 through 79

51. All of these General Tool Purchase Orders required, either on their face or pursuant to specifically referenced and incorporated Statements of Work, Terms of Business Agreements and General Tool Company Quality Assurance Requirements for Suppliers, at least the following:

a) SOFCO must have a quality system and inspection system in place that conforms to MIL-Q-9858A, MIL-I-45208A and MIL-STD-45662A;

b) all SOFCO welders used on the Gen-Set project must be certified in accordance with MIL-STD-278 ("Welding and Casting Standard") and MIL-STD-248 ("Welding and Brazing Procedure and Performance Qualification");

c) SOFCO is to retain all records for seven years;

d) SOFCO must maintain documents that allow for traceability of all components and assembly processes;

e) SOFCO must manufacture the subject base and enclosure assemblies according to all applicable prints, drawings and specifications;

f) SOFCO must submit a Certification of Compliance/Conformance stating that all Purchase Order and drawing requirements have been met.

II. DEFENDANTS VIOLATIONS OF SPECIFIC CONTRACTUAL PROVISIONS

A. Overview

52. Between 1988 and 1994, defendants Allison and GTC manufactured, assembled and delivered to the United States Government approximately 52 Gen-Sets for installation in 17 United States Navy destroyers. These Gen-Sets were designated as series 9130 Gen-Sets.

53. Beginning in 1994 through the present, defendants Allison and GTC manufactured, assembled and delivered to the United States Government over 50 additional Gen-Sets for installation in United States Navy destroyers. These Gen-Sets are designated as series 9140 Gen-Sets.

54. Defendants Allison and GTC expect to manufacture, assemble and deliver in total approximately 166 Gen-Sets to the United States Government.

55. Relator Roger Sanders was an employee of Defendant GTC from November 1988 through March 31, 1994. During his employment with GTC, Mr. Sanders held the position of Project Coordinator and Spare Parts Administrator and was responsible for coordinating the production of all manufactured

parts. Mr. Sanders was employed at GTC during the time that Gen-Set units 4 through 52 were completed and shipped or under construction.

56. Relator Roger Thacker was employed by Defendant GTC from Fall 1984 through November 1995, as a Methods Engineer responsible for developing processes for the manufacture of the Gen-Sets and its component parts along with developing processes for the assembly and testing of the Gen-Sets. Relator Thacker was also appointed as the sole member of the Allison/GTC Gen-Set Material Review Board ("MRB") (Salvage and Repair). Mr. Thacker was employed at GTC during the time that Gen-Set units 1 through 82 were completed and shipped or under construction.

57. Since 1988, three Gen-Sets have been delivered for installation on each of the following United States Navy destroyers, covering destroyers numbered DDG-51 through DDG-82. Though Bath, Ingalls and Allison issued Purchase Orders that associated particular Gen-Set numbers with particular destroyer numbers, occasionally a Gen-Set purchased for one DDG would be installed in another DDG. Though this does not affect the overall substance of the allegations made in this Second Amended Complaint, Relators Sanders and Thacker will also list below the Gen-Set numbers that were actually installed in each ship. This list covers the Gen-Sets made, under construction, or ordered during the time that Relators Sanders or Thacker worked for GTC:

DDG # NAME GEN-SETS INSTALLED	BUILDER	LAUNCH DATE	COMMISSION DATE	HOMEPORT
DDG-51 USS Arleigh Burke 1,2,3	Bath	9/16/89	7/4/91	Norfolk, Va.
DDG-52 USS Barry 5,6,7	Ingalls	5/10/91	12/12/92	Norfolk, Va.
DDG-53 USS John Paul Jones 8,9,10	Bath	10/26/92	12/18/93	San Diego, Ca.
DDG-54 USS Curtis Wilbur 11,12,13	Bath	5/16/92	3/19/94	Yokusuka, Japan
DDG-55 USS Stout 14,20,22	Ingalls	10/16/92	8/13/94	Norfolk, Va.
DDG-56 USS John S. McCain 17,18,19	Bath	9/26/92	7/2/94	Pearl Harbor, Hi.
DDG-57 USS Mistcher 15,16,21	Ingalls	5/7/93	12/10/94	Norfolk, Va.
DDG-58 USS Laboon 23,24,25	Bath	2/20/93	3/18/95	Norfolk, Va.
DDG-59 USS Russell 26,28,32	Ingalls	10/23/93	5/20/95	Pearl Harbor, Hi.
DDG-60 USS Paul Hamilton 29,30,31	Bath	7/24/93	5/27/95	Pearl Harbor, Hi.
DDG-61 USS Ramage 27,33,39	Ingalls	2/11/94	7/22/95	Norfolk, Va.
DDG-62 USS Fitzgerald 35,36,37	Bath	1/29/94	10/14/95	San Diego, Ca.

DDG-63 USS Stethem 34,40,44	Ingalls	6/17/94	10/21/95	San Diego, Ca.
DDG-64 USS Carney 41,42,43	Bath	7/23/94	6/8/96	Mayport, Fla.
DDG-65 USS Benfold 38,46,50	Ingalls	11/9/94	3/30/96	San Diego, Ca.
DDG-66 USS Gonzales 47,48,49	Bath	12/12/94	10/12/96	Norfolk, Va.
DDG-67 USS Cole 45,51,52	Ingalls	4/10/95	6/8/96	Norfolk, Va.
DDG 68 USS The Sullivans 54,55,56	Bath	5/13/95	4/19/97	Mayport, Fla.
DDG 69 USS Milius 53,57,58	Ingalls	10/28/95	11/23/96	San Diego, Ca.
DDG 70 USS Hopper 60,61,62	Bath	1/6/96	5/30/97	Pearl Harbor, Hi.
DDG 71 USS Ross 59,63,64	Ingalls	4/20/96	7/30/97	Norfolk, Va.
DDG 72 USS Mahan 65,66,67	Bath	6/29/96	2/14/98	Norfolk, Va.
DDG 73 USS Decatur 68,69,70	Bath	11/10/96	8/29/98	San Diego, Ca.
DDG 74 USS McFaul 71,72,73	Ingalls	1/18/97	4/25/98	Norfolk, Va.
DDG 75 USS Donald Cook 74,75,76	Bath	5/3/97	12/4/98	Norfolk, Va.
DDG 76 USS Higgins 77,78,79	Bath	10/4/97	4/24/99	San Diego, Ca.
DDG 77 USS O'Kane 80,81,82	Bath	3/28/98	10/23/99	Pearl Harbor, Hi.

DDG 78 USS Porter 83,84,85	Ingalls	11/12/97	3/22/99	Norfolk, Va.
DDG 79 USS Oscar Austin 86,87,88	Bath	11/7/98	2/2000	Norfolk, Va. Fitting out
DDG 80 USS Roosevelt 90,91,92	Ingalls	10/10/99	4/2000	Mayport, Fla. Fitting out
DDG 81 USS Winston S. Churchill 93,94,95	Bath	4/17/99	2001	Norfolk, Va. Fitting out
DDG 82 USS Lassen 96,97,98	Ingalls	10/16/99	2001	Fitting out

58. On information and belief, three Gen-Sets manufactured by defendants Allison and GTC have or will be delivered for installation on new Navy destroyers up to and including destroyer number DDG-107 since the time Relators Sanders and Thacker were terminated from their employment at General Tool Company in March, 1994 and November, 1995, respectively.

59. Defendants have violated the terms of the Government regulations and contracts relating to the construction of these Gen-Sets in numerous ways, as detailed more fully below:

B. Use of Nonconforming Processes and Materials

1. Unauthorized drawing changes

60. The specific instructions for the manufacture and assembly of a new Navy Gen-Set are detailed in a series of drawings. For the 9130 Gen-Sets, the baseline drawing number is 23036000 *et seq*. With the advent of the updated 9140 Gen-Sets beginning

with Unit 53, many of the old drawings were changed. To the extent the 9130 drawings were changed, those modifications are reflected in baseline drawing number 23056000 *et seq.* There are hundreds of these drawings and, together, they specify the material and fabrication process for Gen-Set construction. All contracts and Purchase Orders associated with the United States Navy's procurement of destroyer Gen-Sets, including the Purchase Orders issued to the defendants, specifically require that these drawings be strictly followed.

61. If Allison, GTC or SOFCO wishes to use any material or follow any fabrication process that does not conform to applicable print and drawing requirements, a formal written request must be made for a change in the print or drawing requirements. This drawing change request must then be submitted to Bath, and where appropriate to the Government, for approval. This process is mandated under the terms of the Government contracts issued to Bath and Ingalls, Bath and Ingalls Purchase Orders issued to Allison, Allison Purchase Orders issued to GTC, and GTC Purchase Orders issued to SOFCO.

62. At least during the time that Relators Sanders or Thacker were employed at GTC, covering Gen-Set Units 4 through 82, Allison and GTC regularly made changes to drawings associated with Gen-Set fabrication. Contrary to Purchase Order requirements, Allison and GTC did not submit those change proposals for the approval of the Government. Instead, Allison (through its Project Engineers, Quality Assurance Managers, or Project Managers) and GTC (through its Assembly Foremen,

Quality Control Manager or Project Manager) simply altered the materials or fabrication processes used for Gen-Set construction as called for in the drawings. Allison and GTC would thereafter substitute these new unauthorized Gen-Set drawings for previous drawings used in Gen-Set construction. This happened routinely at GTC's facility during all years that Relators worked at GTC, from 1988 through the end of 1995. For every Gen-Set constructed, some unauthorized drawings were used.

63. All types of Gen-Set drawings were affected by these unauthorized changes, including drawings for fabrication, assembly of piece parts, electrical and Gen-Set assembly.

64. Because Allison's and GTC's method of altering Gen-Set drawings did not conform to Purchase Order requirements, all Gen-Sets that were manufactured or under construction during the time that Relators Sanders and Thacker were employed at GTC, covering Gen-Set Units 4 through 82, were made using unauthorized drawings. GTC thus violated the terms of all of the Allison Purchase Orders listed at paragraph 45 above up to and including Purchase Order H5O5983; and Allison violated the terms of all of the Bath or Ingalls Purchase Orders listed at paragraph 36 above up to and including Bath P.O. 462-125-M46 and Ingalls P.O. RI-03019-011. When the defendants expressly stated on a certificate of conformance that the Gen-Sets had been made in accordance with the terms of the applicable Purchase Orders—that authorized drawings were followed in making the Gen-Sets—such express certifications were knowingly false. And when the defendants impliedly certified via claims for payment for these nonconforming Gen-

Sets that they met Purchase Order requirements, such implied certifications were knowingly false and the claims for payment were knowingly false claims.

65. In addition, defendants actions regarding the use of unauthorized drawings knowingly caused prime-contractors Bath and Ingalls to submit false claims for payment to the Government in violation of the False Claims Act. Bath and Ingalls were required, pursuant to the contracts listed at paragraph 31 above, to expressly certify that the delivered Navy destroyers conformed to all contract specifications. Since Gen-Set units 4 through 82 did not conform to Government contract specifications, destroyers DDG-52 through DDG-77 did not conform to Government contract specifications. Bath's and Ingalls' certifications to the contrary were false, in violation of all of the Government prime contracts beyond the first contract listed at paragraph 31 above. Likewise, Bath and Ingalls made false implied certifications that DDG-52 through DDG-77 conformed to contract specifications every time they made a claim for payment regarding those ships. The associated claims for payment were false claims.

66. On information and belief, defendants' continued to manufacture Gen-Sets using unauthorized drawings, thus submitting or causing to be submitted additional false claims as outlined above after Relators Sanders and Thacker were terminated from their employment at General Tool Company in March, 1994 and November, 1995, respectively.

2. Defectively manufactured parts

67. General Tool makes or buys several of the component piece parts needed for Gen-Set construction and assembly. For efficiency, GTC often

makes or buys at one time enough of a particular part to cover construction of several Gen-Sets. Whether made or bought, these component piece parts must conform to the specifications outlined in Allison's Purchase Orders.

68. One Gen-Set component part fabricated by GTC is a flange for the Gen-Set diffuser assembly. Allison's Purchase Order requires GTC to comply with, among other things, MIL-Q-9858A and all drawing specifications regarding piece part fabrication. Pursuant to these requirements, the flange on the diffuser assembly is to comply with print parameters specifying a thickness of between .240 inches to .296 inches.

69. Near the close of manufacturing the series 9130 Gen-Sets, in early 1993, GTC fabricated a batch of approximately 14 flanges for the Gen-Set diffuser assembly. GTC intended to use these flanges on the remaining 9130 Gen-Sets and the first versions of the 9140 Gen-Sets. This lot of diffuser assembly flanges were manufactured by GTC with thicknesses in excess of the print parameters, with actual thickness ranging from .242 inches through .332 inches. Thus, this particular batch of diffuser assembly flanges was defectively manufactured, with possible serious consequences: the increased variance of the thickness parameters of the flange presents a danger in inconsistent heat distribution and also increases the potential for vibration.

70. Relator Roger Thacker, a GTC Methods Engineer, refused to authorize the shipment of Gen-Sets containing such defective flanges. Defendant Allison was aware and explicitly approved the use of these improperly manufactured flanges. An Allison Gen-Set Engineer assigned to and working at GTC in

Cincinnati was told and shown that this particular lot of diffuser assembly flanges did not conform to drawing specification. Rather than flag the flanges and associated Gen-Sets as nonconforming, this Allison Gen-Set Engineer simply manually changed the print parameters to allow flanges to have thicknesses up to .375 inches and thereafter required that the Gen-Sets containing the defective flanges be shipped. In addition, this drawing change was not immediately submitted for approval in accordance with the terms of the Bath, Ingalls and Allison Purchase Orders, but was instead simply substituted by the Allison Gen-Set Engineer for the previous flange drawing. This rendered all future diffuser assembly flanges that exceeded the original tolerances of between .240 and .296 inches, under the requirements of this unauthorized drawing, nonconforming as well.

71. The nonconforming flanges made prior to the unauthorized drawing change were installed in approximately 14 Gen-Sets from early 1993 through late 1994, covering Gen-Set units numbered in the 40s and 50s. Each of these Gen-Sets, because they contained a part that did not conform to drawing and military specifications, themselves did not conform to the requirements of the Bath, Ingalls or Allison Purchase Orders. This encompassed Bath P.O. numbers 455-125-M46 and 459-125-M46, Ingalls P.O. numbers M2-03019-011 and N9-03019-011, and Allison P.O. numbers H127314 through H205950. Attendant Allison and GTC certifications that these Gen-Sets did conform to the subject Purchase Orders were knowingly false, and associated claims for payment by Allison and GTC were knowingly false claims.

72. These actions by Allison and GTC caused Bath and Ingalls to install defective Gen-Sets in approximately destroyer numbers DDG-63 through DDG-71, and thus caused Bath and Ingalls to deliver defective Navy ships to the Government in violation of contract numbers N-00024-90-C-2800, N-00024-90-C-2801, N-00024-92-C-2800 and N-00024-90-C-2805. Certifications by Bath and Ingalls that the completed destroyers ordered under these contracts conformed to Government requirements were false, and associated claims for payment were false claims.

73. Likewise, Bath, Ingalls and Allison Purchase Order requirements were violated every time a future diffuser assembly flange was manufactured in excess of original tolerances pursuant to the unauthorized drawing and thereafter inserted into a Gen-Set.

74. In addition, by improperly altering the drawing specification for the diffuser assembly flange, Allison and GTC violated the terms of the Bath, Ingalls and Allison Purchase Orders that mandated that proposed drawing changes be submitted for approval by the prime contractors and the Navy. Regarding this modification of tolerances for diffuser assembly flanges, neither the United States Government nor the contracting officer approved of this print modification. This conduct in making unauthorized drawing changes violates the False Claims Act as described more fully at section II.B.1. above.

3. Nonconforming material from subcontractors

75. Gen-Set assembly requires use of dozens of special heavy duty bolts known as "shock mount bolts." Defendant Allison purchased these bolts,

often thousands at a time, from a designated subcontractor, usually Rocket Supply, and had them shipped directly to GTC. Under the terms of Allison's Purchase Order, Statement of Work, MIL-Q-9858A and MIL-I-45208A, GTC is required to inspect and test the shock mount bolts for conformance to drawing requirements.

76. GTC, in conformity with these requirements, sent a small sampling from a received shipment of shock mount bolts to a testing facility. This facility performed the critical "tensile tests" on the shock mount bolts. These tensile tests determined whether the bolts could withstand the pressures and stresses associated with use on a Navy Gen-Set.

77. During the latter stages of construction of the 9130 Gen-Sets, Allison ordered and delivered to GTC a shipment of approximately 2,000 shock mount bolts. The exact date of this shipment can be found on GTC's Receiving Inspection Report as completed by GTC's Receiving Inspector.

78. GTC, through its Allison Project Quality Control Manager, did in fact send a small representative sample from this lot of bolts to undergo the tensile tests. The representative bolts failed the required tensile tests. On two additional occasions, GTC's Quality Control Manager re-submitted a small representative sample of the shock mount bolts to the testing facility, and on both occasions the bolts again failed the tensile tests. Because the representative sample bolts failed the required quality assurance tensile tests, none of the 2,000 shock mount bolts contained in this particular shipment conformed to Purchase Order specifications.

79. GTC's Gen-Set Program Manager, GTC's Quality Control Manager, Allison's Chief Engineer, and Allison's Quality Specialist all knew that the shock mount bolts failed the tensile tests. Nevertheless, Defendant GTC and Allison continued to use the bolts in the assembly and manufacture of the 9130 and 9140 Gen-Sets, despite their knowledge that their bolts had failed the tensile tests and therefore did not meet the Government contract requirements imposed by Purchase Order on both Allison and GTC.

80. Pursuant to Allison's Purchase Order, GTC should have rejected this lot of shock mount bolts and taken steps to ensure that they were never used on the Gen-Set project. Instead, GTC's Quality Control Manager and Project Manager, with full knowledge and acquiescence of Allison's Engineers and Quality Specialists, allowed these nonconforming bolts to remain in the "crib" area of GTC's shop. When an individual GTC Gen-Set Assembler needed more shock mount bolts, that person would take bolts from this lot of approximately 2,000 nonconforming bolts.

81. Eventually, all of the remaining shock mount bolts from this nonconforming lot were used on Gen-Sets. Because the process for using these nonconforming bolts was sporadic, haphazard and unsupervised, as many as twenty Gen-Sets were assembled with these bolts. This would encompass the twenty Gen-Sets that were under construction or completed immediately after the date on the Receiving Inspection Report for this shipment, and would include the final 9130 Gen-Sets and the first several 9140 Gen-Sets.

82. Each Gen-Set contains a pneumatic shut-off valve purchased by GTC from a designated subcontractor, Check-All Valves. As detailed in the Gen-Set drawings, these valves must meet specific Government design specifications regarding the functioning and longevity of the valve seal or "seat.". None of the pneumatic shut-off valves purchased and installed in Gen-Set Units 4 through 82, covering the Gen-Sets manufactured or under construction during the time that Relator Sanders or Thacker worked at GTC, conformed to the drawing specifications. Specifically, the seal or "seat" area of the valve was not made to drawing specifications, and therefore is susceptible to premature wear and malfunction.

83. Defendants GTC and Allison were aware that all of the pneumatic shut-off valves did not conform to drawing specifications. GTC's Receiving Inspector, Quality Control Manager, and Project Manager all knew of this nonconformity. Likewise, Allison personnel on-site at GTC's Cincinnati facility, including the Allison Project Engineers, Project Manager and Quality Assurance Manager, knew that the pneumatic shut-off valves were nonconforming. Yet Allison and GTC, through these people, used these valves in Gen-Set construction.

84. At least during the construction of Gen-Sets 4 through 82, when Relators Sanders or Thacker worked at GTC, neither Allison nor GTC obtained a proper drawing change addressing this pneumatic shut-off valve nonconformity. And Allison and GTC did not inform the Government that the Gen-Set pneumatic shut-off valves violated drawing requirements. As a result, the pneumatic shut-off valve on the Gen-Sets provided to the United States

Navy were manufactured and installed contrary to Navy specifications.

85. Because the pneumatic shut-off valves are nonconforming, the associated Gen-Sets 4 through 82 are themselves nonconforming, and thus violate the terms of Allison's Purchase Orders listed at paragraph 45 above up to and including P.O. number H5O5983. In turn, these nonconforming Gen-Sets violated the terms of all of the Bath and Ingalls Purchase Orders listed at paragraph 36 above beyond the first Bath Purchase Order, and all of the prime Government contracts beyond the first listed at paragraph 3l above. Allison and GTC certifications that these Gen-Sets met all Purchase Order requirements were knowingly false, whether made explicitly on a certificate of conformance or implicitly pursuant to claims for payment for these Gen-Sets. Attendant claims for payment were knowingly false claims. Finally, because of the nonconforming Gen-Sets 4 through 82, Bath and Ingalls certifications that destroyers DDG-52 through DDG-77 met contract requirements were false, and associated claims for payment were false claims.

86. On information and belief based on the foregoing facts, Allison and GTC have continued to use nonconforming pneumatic shut-off valves on Gen-Sets manufactured since the time Relators Sanders and Thacker were terminated from their employment at General Tool Company in March, 1994 and November, 1995, respectively. These Gen-Sets include those to be delivered for installation on new Navy destroyers up to and including destroyer number DDG-107.

87. GTC subcontracted with Cincinnati Hose & Fittings, Inc. to supply various tubes needed for Gen-Set construction. GTC was required, by the terms of the Allison Purchase Orders and Statement of Work that called for strict adherence to MIL-Q-9858A and MIL-I-45208A, to inspect parts received by its subcontractors to ensure that they were manufactured in accordance with drawing specifications.

88. On a number of occasions during the final period of construction of the 9130 Gen-Sets and the early period of construction of the 9140 Gen-Sets, parts were delivered from Cincinnati Hose & Fittings, Inc. which were not manufactured to print specifications. GTC knew that tubes from Cincinnati Hose and Fitting that were delivered during this time were not manufactured according to print specifications, through its Quality Control Manager, Project Manager, Assembly Foreman, Receiving Inspector and Gen-Set Assemblers.

89. These Cincinnati Hose and Fitting nonconforming parts were brought into GTC's plant surreptitiously bypassing the receiving inspection department, and thus no Receiving Inspection Reports were completed by the GTC Receiving Inspector for several shipments during this time. As there is no proper receiving documentation for these clandestinely-delivered parts, the general dates of these shipments of nonconforming parts from Cincinnati Hose and Fitting can best be established by the obvious gap in Receiving Inspection Reports for materials from that company. The Receiving Inspection Report is required under the terms of the Allison Purchase Orders, Quality Manuals, Statement of Work and under the terms of MIL-Q-

9858A and MIL-I-45208A that are imposed on GTC by Allison's Purchase Orders and Statement of Work.

90. These parts were not subjected to required Receiving Inspection Reports because they did not conform to drawing requirements. Nonetheless, GTC through its Project Manager, Quality Control Manager, Assembly Foremen and GTC Assemblers used Cincinnati Hose and Fittings tubes for installation in Gen-Sets without them ever being subjected to tests and quality controls. Allison was aware of this practice through its Gen-Set Project Engineers, Quality Assurance Managers or Project Managers stationed on-site at GTC's Cincinnati facility.

91. In 1994, near the end of the manufacture of the 9130 Gen-Sets, approximately 16 tubes supplied by Cincinnati Hose & Fittings, Inc. were inspected at GTC and rejected for noncompliance with contract specifications, including bend radii, flare discrepancies and surface discrepancies. Relator Roger Thacker, the appointed Gen-Set MRB, was the only person authorized by Allison and GTC to determine the disposition of the tubes. Relator Thacker directed that these tubes be returned to the vendor. Nevertheless, the tubes were installed in the early versions of the 9140 Gen-Sets at the direction or with full knowledge of Allison (through its Gen-Set Project Engineers, Quality Assurance Managers or Project Managers) and GTC (through its Project Manager, Quality Control Manager, Assembly Foremen.) Relator Thacker discovered this problem and reported it to the GTC Gen-Set Project Manager and Quality Control Manager who did nothing to correct the problem.

92. On another occasion, in the Spring of 1995, GTC received a tube from Cincinnati Hose & Fittings, Inc. that was bent 180 degrees backward. GTC, nevertheless, used the tube by having a GTC Gen-Set Assembler bend the tube so that it would fit on the 9140 Gen-Set. The Gen-Set involved was one under construction on the floor of GTC during the Spring of 1995. This action invalidated the supplier's certification which was based, in part, on a pressure test. This part thus did not conform to the requirements of Allison's Purchase Order, Quality Manuals, and Statement of Work calling for strict adherence to the quality and inspection standards mandated by MIL-Q-9858A and MIL-I-45208A. Allison was aware of this particular nonconformity through its Project Engineers, Quality Assurance Managers or Project Managers stationed on site at GTC.

93. Likewise, Relator Thacker directed that a duplex valve for a 9140 Gen-Set, Unit 69, be returned to the vendor after it failed the receiving inspection. Again, without Relator Thacker's authorization, the valve was incorporated into Gen-Set Unit 69 at the direction or with full knowledge of GTC through its Assembly Foreman, Quality Control Manager and Project Manager, and with full knowledge of Allison through its Gen-Set Project Engineers and Quality Assurance personnel on site at GTC. This use of a nonconforming duplex valve on Unit 69 rendered that Gen-Set nonconforming, and thus violated the terms of Allison Purchase Order number H319865. In turn, the delivery and installation of this nonconforming Gen-Set violated the terms of Bath Purchase Order 462-125-M46 and Government contract number N-00024-93-C-2800. Certifications by Allison and GTC that Unit 69

conformed to Purchase Orders specifications were knowingly false, and associated claims for payment were knowingly false claims. Finally, because of the conduct of Allison and GTC, Bath's certification that DDG-73, the USS Decatur, conformed to all Government contract specifications was false, and associated claims for payment were false claims.

94. During the construction of the 9130 Gen-Sets, in approximately 1993, GTC ordered and received a shipment of copper pipe from a foreign supplier for installation on the Gen-Sets. This copper pipe was ordered for use in approximately Gen-Sets 26 through 52. The GTC Receiving Inspector, Quality Control Manager and Project Manager rejected this shipment of copper as nonconforming to the requirements of the Allison Purchase Order because it was subject to "delaminaton," a process by which sheets or layers of the copper peel off of the pipe during welding or brazing, resulting in an unsound structural component. Thereafter, a new shipment of copper pipe was ordered and used on these particular Gen-Sets.

95. Despite the rejection of this copper pipe, GTC, through its Receiving Inspector, Quality Control Manager, and Project Manager, did not return the pipe as defective, instead storing the pipe behind the GTC assembly area.

96. At about the time of the change from the series 9130 Gen-Sets to the series 9140 Gen-Sets, in approximately 1994, GTC decided to use the nonconforming copper pipe instead of purchasing a new shipment. GTC, through its Project Manager and Quality Control Manager, directed the GTC sea water systems assembler to utilize the rejected

copper pipe on a piece meal basis in the Gen-Sets for the sea water cooling system. This began with the first series 9140 Gen-Sets, and continued thereafter until all of the nonconforming copper pipe was used. This encompassed approximately the first 15 to 27 series 9140 Gen-Sets, during approximately 1994 to 1995, and includes all 9140 Gen-Sets up to and including the time when the next copper pipe shipment was ordered, received and used.

97. Every series 9140 Gen-Set that contains some of the nonconforming delaminated copper pipe is itself nonconforming. This would include Gen-Set numbers approximately 53 through 79, installed on destroyer numbers DDG-68 through DDG-76. The use of this nonconforming copper pipe thus violated Allison Purchase Orders listed at paragraph 45 above from P.O. number H205968 through H319868, Bath Purchase Orders 459-125-M46 and 462-125-M46, Ingalls Purchase Orders N9-03019-011 and R1-03019-011, and Government contract numbers N-00024-92-C-2800, N-00024-92-C-2805, N-00024-93-C-2800 and N-00024-93-C-2806.

98. GTC's certifications, whether express through a certificate of conformance issued pursuant to Allison Purchase Order, or implied via claims for payment associated with Gen-Sets 53 through 79, were knowingly false. And the associated GTC claims for payment were knowingly false claims. Bath, Ingalls and Allison certifications and claims for payment associated with Gen-Set numbers 53 through 79 were false.

99. One key component of an assembled Gen-Set is the gearbox. Allison purchased the gearboxes for the series 9130 Gen-Sets from Westech, Inc., of California. None of these gearboxes met the

requirements of the Bath, Ingalls and Allison Purchase Orders. One or more of the following problems appeared on each of the Westech gear boxes: defective seals and gaskets; machining defects; bearing failures; chipped gears; defective bearing sensors; and defects in the porosity of the metal. These defects violated the Purchase Orders and drawing requirements for the Gen-Set gearboxes.

100. These defects with the Westech gearboxes were commonly known by Allison and GTC Gen-Set personnel. In fact, Westech gearboxes-were dismantled by GTC as well as Allison personnel, revealing the defects listed above. Specifically, the fact that no Westech gearboxes conformed to drawing requirements was known by Allison through its Project Engineers, Quality Assurance Managers, and Project Managers, and by GTC through its Project Manager, Quality Control Manager, Assembly Foremen and Gen-Set Assemblers.

101. Despite this knowledge that all Westech gearboxes were defective and thus nonconforming, defendants installed them in all of the 9130 Gen-Sets. Because all of the Westech gearboxes violated Purchase Order and drawing requirements, installation of them into the series 9130 Gen-Sets rendered all of those Gen-Sets nonconforming. This violated the terms of Allison Purchase Orders listed at paragraph 45 above up to and including P.O. number H127351. In turn, the use of nonconforming Westech gearboxes violated the terms of Bath P.O. numbers 451-125-M46, 452-125-M46, and 455-125-M46, Ingalls P.O. numbers J6-03019-011, L1-03019-011, and M2-03019-011, and Government contract numbers N-00024-85-C-2144, N-00024-87-C-2256, N-

00024-87-C-2257, N-00024-89-C-2033, N-00024-89-C-2034, N-00024-90-C-2800, and N-00024-90-C-2801.

102. Allison and GTC certifications that Gen-Sets 1 through 52 complied with all applicable Purchase Order requirements, either expressed or implied via claims for payment for these Gen-Sets, were knowingly false, and associated claims for payment were knowingly false claims. In turn, Allison's and GTC's improper use of nonconforming gearboxes caused Bath and Ingalls to certify falsely to the Navy that the associated destroyers, DDG-52 through DDG-67, complied with all Government contract specifications. And all claims for payment by Bath and Ingalls regarding these ships were false claims.

4. Improper packaging

103. According to Government contract requirements, as imposed on Allison and GTC by Gen-Set Purchase Orders, all external openings for lubricants must be secured by locks designated by the United States Government. Locking external openings for lubricants is necessary to prevent tampering and sabotage of the Gen-Sets. Thus, the packaging and shipping of these Gen-Sets without the required government security locks renders all of the Gen-Sets susceptible to tampering and possible sabotage.

104. Gen-Set drawing requirements call for the installation of 5 specifically designed Government locks, Part No. 23038520. During the time that Relators Sanders and Thacker worked for GTC, covering the entire period of series 9130 Gen-Set construction, no series 9130 Gen-Sets were shipped containing the required 5 locks.

105. Allison (through its Project Engineers, Quality Assurance Manager, and Project Manager) and GTC (through its Project Manager, Quality Control Manager, Assembly Foreman, and Gen-Set Assemblers) were at all relevant times aware of the Government contract requirements that external openings for lubricants must be secured with locks.

106. Relator Thacker was employed by GTC at least through the period when all series 9130 Gen-Sets were shipped, and thus series 9130 Gen-Sets numbered 1 through 52 violated Government contract requirements because none of them were shipped with all required locks for external openings for lubricants. Allison and GTC, through the individuals mentioned above, knew that Gen-Sets 1 through 52 were shipped without all required locks.

107. Allison and GTC failure to follow Government requirements regarding these external locks violated the requirements of the following contracts and Purchase Orders: all Government contract numbers listed at paragraph 31 above up to and including contract number N-00024-90-C-2801; all of the Bath and Ingalls Purchase Orders listed at paragraph 36 above up to and including Bath P.O. number 455-125-M46 and Ingalls P.O. number M2-03019-011; and all Allison Purchase Order numbers listed at paragraph 45 above up to and including P.O. number H127351. Because of these violations, every time Allison and GTC explicitly certified via an executed certificate of conformance, or implicitly certified via a claim for payment, that Gen-Set numbers 1 through 52 conformed to Purchase Order requirements, such certifications were knowingly false. And associated Allison and GTC claims for payment were knowingly false claims.

108. In addition, the actions of Allison and GTC regarding locks for external lubricant openings knowingly caused prime contractors Bath and Ingalls to install nonconforming series 9130 Gen-Sets in destroyers numbered DDG-51 through DDG-67. Bath and Ingalls certifications, either explicit or implicit when claims for payment were made, that these destroyers conformed to Government contract specifications were false. And associated claims for payment were false claims.

5. Improper designation of Relator Thacker as MRB

109. As part of its Gen-Set manufacturing project, GTC created a Material Review Board (salvage or repair) ("MRB") designed to analyze and prepare proposed changes or repair procedures in the manufacture and construction of the Gen-Sets. The MRB must determine the proper disposition of any part or product made under the Gen-Set program that has any characteristics which depart from the requirements in the Government contracts, various Allison Purchase Orders, drawing specifications, or other approved product description. Possible dispositions for nonconforming material include: scrapping the material; reworking it; returning it to the supplier (where applicable); requesting that the offended drawing be changed or its requirements waived; repairing the material so that it conforms to all requirements; hold the material for customer evaluation; or use the material "as is."

110. The authority and responsibilities of the MRB are governed by the terms of the Government contracts and the Bath, Ingalls and Allison Gen-Set Purchase Orders, which require by reference that Allison and GTC comply with their own Quality

Manuals and MIL-STD-1520C regarding MRB functioning.

111. Under such terms, the MRB must be comprised of several individuals representing the quality, manufacturing and managing aspects of Gen-Set construction. If the MRB proposes a certain repair to bring nonconforming material within proper drawing specifications, it must have such proposal approved by Allison. And if the General Tool MRB proposes that drawing requirements and procedures be changed, it must submit such proposal to Allison who, in turn, must submit the proposed drawing change to Bath or Ingalls for approval, where appropriate, by the Navy.

112. Allison and GTC did not follow proper MRB procedures on the Gen-Set project. Rather than establishing a MRB consisting of several individuals representing all aspects of Gen-Set construction—as is required by Government requirements imposed on Allison and GTC by Purchase Order—Allison and GTC simply designated one GTC employee, Relator Roger Thacker, as the "Gen-Set MRB." This occurred beginning with Gen-Set Unit 4 and continued for each Gen-Set thereafter until Relator Thacker was terminated from his employment in November, 1995. Allison and GTC could thus save the time and expense necessary to properly disposition nonconforming material.

113. Thereafter, Allison (through its Project Engineer, Quality Assurance Manager, and Project Manager) and GTC (through its Project Manager and Quality Control Manager) directed Relator Thacker to disposition nonconforming material without following Government drawing-change requirements. Specifically, during the time that Relator Thacker

was the MRB, and on a continual and nearly daily basis, he was ordered by Allison and GTC, through the aforementioned people, to: a) implement proposed repairs without submitting them to Allison for formal approval; and b) implement proposed changes in drawing material or procedures without submitting such changes to Allison so that they could be eventually approved by the Navy. Thus, the General Tool MRB improperly dispositioned nonconforming material without the required knowledge or approval of the prime contractor or the Navy.

114. Allison's and GTC's improper designation of Relator Thacker as the official Gen-Set MRB, and associated actions in using the "MRB" to improperly disposition nonconforming material, violated the terms of the Government contracts and the Bath, Ingalls and Allison Purchase Orders regarding Gen-Set construction. This encompasses all the Gen-Sets built or under construction during the time that Relator Thacker worked for GTC, up to and including Gen-Set number 82, covering destroyers DDG-52 through DDG-77. All Government contracts and Bath, Ingalls and Allison Purchase Orders associated with these Gen-Sets were violated. All certifications and claims for payment by Allison and GTC regarding these Gen-Sets were knowingly false. All certifications and claims for payment by Bath and Ingalls regarding DDG-52 through DDG-77 were false.

C. Improper Testing

115. Arleigh Burke class Navy destroyers are designed to be stealth ships, able to move about virtually undetected by radar or sonar through a series of design specifications—for instance, the ship

is designed so that there are no right angles to the water, impeding enemy detection—called for in the Ship Specifications attached to the Government's prime contracts with Bath and Ingalls. To maintain the advantages given by stealth operation, noise coming from within the ship must be minimized. Thus, all destroyer Gen-Sets must, according to the requirements set forth in the Government's Ship Specifications and incorporated into Bath Procurement Specification 450-310-01A, pass an airborne noise test. These requirements flow down to Allison and GTC through Bath and Ingalls Purchase Orders that specifically require adherence to Bath Procurement Specification 450-310-01A.

116. In order to ensure the quality of these noise tests, Allison developed an Allison Test Manual that dictates that the test must be done in a controlled environment to assure the continuity and accuracy of the test. GTC violated this requirement on approximately the first half of the series 9130 Gen-Sets, as the airborne noise test was conducted outdoors near passing trains and automobile traffic. GTC conducted these improper tests through its Project Manager and Quality Control Manager. Allison was aware of this improper testing because its Project Engineers and Quality Assurance Manager stationed at GTC were present during these noise tests.

117. In approximately 1992, GTC completed the construction of a building in which the airborne noise tests on all future Gen-Sets would be done. Every Gen-Set tested for airborne noise prior to the completion of this testing building violated the testing requirements of the Allison Purchase Orders. All Allison and GTC certifications that these Gen-

Sets conformed to Bath, Ingalls and Allison Purchase Order requirements were knowingly false, and associated claims for payment were knowingly false claims. Bath and Ingalls certifications to the Government that the destroyers that contained these nonconforming Gen-Sets complied with all contract requirements were false, and associated claims for payment were false claims.

118. Microphones used in the airborne noise test must be positioned according to an Allison quality plan developed in accordance with the Allison Test Manual. Allison and GTC must comply with these test requirements pursuant to the terms of the Bath, Ingalls and Allison Purchase Orders. Contrary to the requirements of the Allison airborne noise test, GTC personnel routinely moved the microphones used for the noise test. By this process, Allison and GTC could ensure that the Gen-Sets would pass Government contract and Ship Specifications requirements. These actions were done on all of the Gen-Sets tested during the time that Relators Sanders or Thacker worked at GTC, including Units 4 through 76. These actions were done at the direction of, or with the full knowledge of Allison's Chief Engineers, Quality Assurance Manager, and Project Manager, and GTC's Project Manager and Quality Control Manager.

119. Because of this conduct, Gen-Set Units 4 through 76 do not comply with Bath, Ingalls and Allison Purchase Order requirements, and thus do not comply with the requirements of the Government's prime contracts, including Ship Specifications, with Bath and Ingalls. Allison and GTC certifications that these Gen-Sets do comply with the associated Purchase Orders listed at

paragraphs --- and --- above are knowingly false, and attendant claims for payment regarding these Gen-Sets are knowingly false claims. Likewise, Allison's and GTC's actions regarding these nonconforming Gen-Sets have caused Bath and Ingalls to submit false certifications that the destroyers containing Gen-Sets 4 through 76 comply with Government contract requirements, and has caused Bath and Ingalls to submit associated false claims for payment.

120. On information and belief based on the foregoing facts, Allison and GTC continued, after Relators Sanders and Thacker were terminated from their employment from GTC in March, 1994 and November 1995, to manipulate the positioning of microphones during airborne noise tests. This conduct has caused the continued submission of false claims in the same manner as outlined above.

121. Additionally, defendant GTC was required by Allison Purchase Order and Allison Test Manual to test completed Gen-Sets on two separate occasions for compliance with military specifications regarding vibration, harmonics and noise. These two separate, identical tests are undertaken so that test data may be compared and discrepancies analyzed. From the beginning of Gen-Set construction through the summer of 1995, GTC conducted only a single test on each Gen-Set thereby ensuring that there were no discrepancies and, therefore, avoiding any costs in analyzing and correcting discrepancies. Allison knew that only a single test was being performed because its Project Engineers, Quality Assurance Manager, and Project Manager were present at relevant times at GTC's Cincinnati facility.

122. Every Gen-Set that was subjected to a single test was therefore made in contravention of Bath, Ingalls and Allison Purchase Order requirements. This would encompass all Gen-Sets tested up to the Summer of 1995. Allison and GTC certifications that these Gen-Sets conformed to Purchase Order requirements were knowingly false, and attendant claims for payment were knowingly false claims. In addition, when Bath and Ingalls installed these nonconforming Gen-Sets in Navy destroyers and certified that the destroyers conformed to Government contract specifications, such certifications were false and associated claims for payment were false claims.

123. GTC conducted many tests on Gen-Sets that had not yet been completed, in contravention of the requirements of Allison's Purchase Orders and its Allison Test Manual. On several occasions, a Gen-Set scheduled to undergo final testing was not fully assembled. Rather than postpone the tests, GTC would temporarily install on the Gen-Set to be tested parts from another Gen-Set under construction. After the tests were completed, the borrowed parts would be removed from the tested Gen-Set for reinstallation on the Gen-Set under construction. Thereafter, the tested Gen-Set was completed with the part or parts it needed when new shipments came in. The Gen-Set would then be shipped without further testing. This procedure violated the terms of Allison's Test Manual, which required testing of completed Gen-Sets only, and therefore violated the terms of Allison's Purchase Order to GTC. Allison was aware of this conduct through its Project Engineers, Quality Assurance Manager and Project Manger present at GTC's Cincinnati facility. This process was used on

approximately six occasions during the time that Relators Sanders and Thacker worked at GTC.

D. Manipulation Of Gen-Set Electricity Output

124. United States Navy destroyer Ship Specifications, attached to the prime Government contracts with Bath and Ingalls, require that the 9130 and 9140 Gen-Sets produce at least 2500kw of electricity in order to adequately power all ship functions. This specifications is imposed on Allison and GTC by Bath, Ingalls and Allison Purchase Orders. However, in testing, GTC and Allison discovered that the Gen-Sets could not produce this required output of electricity under normal operation. Therefore, GTC and Allison manipulated the electronic fuel governor (made by a company called Woodward) to increase the fuel output thereby causing the Gen-Set to operate at above normal capacity to meet the 2500kw required electricity output. This unauthorized modification results in excessive start-up and operating temperatures thereby causing excessive wear on the metal components increasing the stress and likelihood of premature failure of the Gen-Sets.

125. This manipulation of the fuel governor took place at GTC's facility and on all Gen-Sets tested during the time that Relators Sanders and Thacker worked at GTC, encompassing approximately Gen-Sets 4 through 76. Thus, none of these Gen-Sets conform to design specifications and are nonconforming to Government contract and associated Purchase Order requirements. These actions were undertaken by and in the presence of Allison Project Engineers, Quality Assurance Manager, and Project Manager, and GTC Project

Manager and Quality Control Manager. Allison and GTC certifications, express or implied, that these Gen-Sets conformed to Purchase Order specifications were knowingly false, and associated claims for payment were knowingly false claims. Because of these actions by Allison and GTC, Bath and Ingalls falsely certified to the Government that destroyers containing these nonconforming Gen-Sets, approximately ships DDG-52 through DDG-75, conformed to contract specifications. And associated claims for payment by Bath and Ingalls were likewise false claims.

126. On information and belief based on the foregoing facts, Allison and GTC continued, after Relators Sanders and Thacker were terminated from their employment from GTC in March, 1994 and November 1995, to manipulate the Woodward fuel governor in order to produce the required output of electricity. This conduct has caused the continued submission of false claims in the same manner as outlined above.

E. Improper Quality Control Documentation And Traceability

127. Defendant GTC falsified documents regarding the assembly and piece part manufacturing and inspection processes. Allison Purchase Orders issued to GTC, requiring that GTC adhere to, among other things, MIL-Q-9858A, requires that defendant GTC establish and maintain assembly and piece part manufacturing processes and inspection data. The fabrication, assembly and inspection of each Gen-Set is documented on GTC Gen-Set Assembly Instructions. These Assembly Instructions are step-by-step instructions for the production of Gen-Set components based on

drawings, Purchase Order terms, specifications and Mil-Specs requirements. Quality inspection of the Gen-Set components are reflected on the Assembly Instructions with the date and stamp of the quality inspector. Between 50 and 70 component part assemblies require such quality inspection dates and stamps as part of the production process for each Gen-Set.

128. When the series 9130 Gen-Sets were produced, many of the quality inspections on components were ignored by GTC. GTC did not retain sucn information in contravention of Purchase Order and Government contract requirements. In order to avoid Government discovery of this violation of the contract requirements, GTC Quality Inspectors held "stamping parties" where they spent days affixing quality inspection stamps on the Gen-Set Assembly Instructions for Gen-Sets that had been shipped to Bath and Ingalls months or years earlier.

129. For example, on January 19, 1994, a GTC Quality Inspector affixed a quality assurance acceptance stamp on the Assembly Instruction for the Cable Termination Assembly for Gen-Set Unit 26. However, at that time Unit 26 had already been shipped to Ingalls on April 22, 1992--21 months before the GTC Quality Inspector affixed the Quality Assurance acceptance stamp on the Assembly Instructions Gen-Set Unit 26 was installed in the DDG-59, USS Russell. GTC personnel, including its Assembly Foreman, followed this same procedure in 1989 and 1990.

130. GTC's failure to establish and maintain assembly and piece part manufacturing processes and inspection data, as required by MIL-Q-9858A,

affected all of the series 9130 Gen-Sets, covering Units 4 through 52. This conduct violated all of the Government contracts and Bath, Ingalls and Allison Purchase Orders associated with these Gen-Sets.

131. Gen-Sets were inspected and approved by DCAS (Defense Contract Auditing Service) at Defendant GTC's facility in Cincinnati, Ohio. If a component of the Gen-Set did not meet MIL-Specs or failed to comply in some fashion with contract requirements, a "hold" tag was placed on the component part for correction. Additionally, a component may contain a nonconforming material report ("NMR") tag designating some defect in a component.

132. On more than one occasion during 1994 and early 1995, "hold" tags or NMR tags on components of 9130 and 9140 Gen-Sets were removed or hidden by GTC's Quality Control Manager, and Project Manager when DCAS inspectors were in the GTC facility to prevent DCAS detection of defects in the Gen-Sets. Allison's Chief Engineer also removed hold tags on the computerized controls for the Gen-Sets when DCAS inspectors were present.

133. Removing or hiding "hold" or NMR tags allows a Gen-Set that does not conform to Purchase Order specifications to be accepted and installed in a Navy destroyer without the underlying defect being cured. These actions render Allison and GTC certifications that the subject Gen-Sets conform to all Purchase Order requirements knowingly false, and attendant claims for payment knowingly false claims. Likewise, Bath and Ingalls certifications that the destroyers containing these nonconforming Gen-Sets conform to Government contract

specifications were false. Attendant Bath and Ingalls claims for payment were false claims.

F. Failure To Maintain Records

134. By Allison Purchase Order and Statement of Work requirements, GTC was itself required, along with its subcontractors, and commercial vendors, to retain all records on procurement, fabrication, assembly and testing for a minimum of five to seven years from shipment of the Gen-Set. Nevertheless, defendant GTC did not require that its subcontractors and commercial vendors retain such records for the mandated time period in order to avoid additional costs and, in fact, knew that its subcontractors and vendors such as Cincinnati Hose and Fitting and Tri-State Fabricators specifically failed to keep such records for the required time period.

G. GTC Use Of Uncertified Subcontractors

135. During the period of approximately 1990 through 1992, Defendant GTC obtained piece parts for the 9130 Gen-Sets from subcontractors Tri-State Fabricators, Chem-Pac, and Cincinnati Hose and Fitting. None of these companies maintained a Quality Manual or associated quality process. GTC was required, by Allison Purchase Order and Statement of Work mandating compliance with MIL-Q-9858A, that such Quality Manuals be created and followed. Throughout this period of time, GTC knew, through its Project Manager and Quality Control Manager, that these subcontractors had no process or manual to assure quality of the Gen-Set piece parts.

136. All Gen-Sets constructed during this period thus did not conform to Purchase Order

requirements because GTC was using subcontractors in a manner inconsistent with MIL-Q-9858A. GTC certifications to the contrary were knowingly false, and associated claims for payment were knowingly false claims. GTC's production of nonconforming Gen-Sets also caused false certifications and claims to be made by Bath, Ingalls and Allison pursuant to the Government contracts listed above.

137. Beginning in 1988, Allison and GTC conducted quality assurance audits of defendant SOFCO, finding on each occasion, among other things, that SOFCO was not using certified welders and certified welding inspectors. GTC was required by Allison Purchase Order, Statement of Work and MIL-Q-9858A, to ensure that SOFCO was using certified welders and welding inspectors in accordance with MIL-STD-278 and MIL-STD-248. GTC's continued use of SOFCO as a subcontractor for Gen-Set base and enclosure assemblies, without ensuring compliance with the above Mil-Specs, violated the terms of its Purchase Order from Allison.

138. For example, in 1988, Defendant SOFCO was subject to a quality assurance audit by Defendant GTC. Defendant SOFCO failed the quality assurance audit in numerous categories of quality control, such as, welder certifications and eye exams, improper documentation of fabrication process on travelers, improper material control, failure to follow print specifications, and failure to meet calibration standards. Defendant SOFCO failed the same audit on the same or similar categories of quality control in 1991 and 1993. Nevertheless, Defendant GTC continued to employ

Defendant SOFCO for the manufacture of base assemblies and enclosures.

139. Defendant Allison knew that SOFCO was not in compliance with the requirements of MIL-Q-9858A because Allison itself conducted audits of SOFCO manufacturing processes and itself found, among other things, that SOFCO was using uncertified welders and welding inspectors.

140. Despite never fully complying with the requirements of MIL-Q-9858A, SOFCO was allowed by Allison and GTC to make base and enclosure assemblies under GTC Purchase Orders regarding at Units 1 through 79. Allison and GTC actions in using SOFCO thus violated all Bath, Ingalls and Allison purchase orders for Units 1 through 79, and caused Bath and Ingalls to violate all of the Government contracts listed at paragraph 31 above up to and including N-00024-93-C-2806.

H. SOFCO Contract Violations

141. To ensure quality control, SOFCO is required under the terms of the Purchase Orders issued to it by GTC to manufacture Gen-Set base and enclosure assemblies in strict accordance with MIL-Q-9858A, MIL-I-45208A and MIL-STD¬45662. Under these military specifications, SOFCO is responsible for assuring that all supplies it purchases from its subcontractors and uses on the Gen-Set project conform to Government contract requirements.

142. Under MIL-Q-9858A, MIL-I-45208A and MIL-STD-45662, SOFCO must institute specific procedures to ensure the quality of products received from its subcontractors on the Gen-Set project. Under these military specifications, SOFCO must

require that its subcontractors on the Gen-Set program are certified to perform the requested work. SOFCO must also require that its subcontractors create and maintain documentation that work performed on the Gen-Set project conforms to Government specifications. And SOFCO must also regularly verify that its subcontractors on the Gen-Set program are, in fact, complying with Government specifications.

143. When SOFCO delivered each completed Gen-Set base and enclosure assembly to GTC, it submitted with it a signed Certificate of Conformance specifically certifying that it had complied with all GTC Purchase Order requirements in manufacturing the subject base and enclosures.

144. Defendant SOFCO failed to certify under MIL-Q-9858A, MIL-I-45208A and MIL-STD-45662 any of the subcontractors it used on the Gen-Set project, including J. Niel Enterprises and Caryco, Inc. This conduct by SOFCO encompassed all Gen-Set base and enclosure assemblies that it manufactured and delivered to GTC. These base and enclosures were used on Gen-Set numbers 4 through 79. This conduct violated the requirements of MIL-Q-9858A, MIL-I-45208A, and MIL-STD-45662 and thus violated the requirements imposed upon SOFCO by GTC's various Purchase Orders for the Gen-Set base and enclosure assemblies. When SOFCO certified, pursuant to the Certificate of Conformance issued with all completed base and enclosure assemblies, that all requirements imposed on it by GTC's Purchase Orders had been satisfied, such certification was false.

145. Defendant-SOFCO did not require that any of the subcontractors it used on the Gen-Set project,

including J.-Niel Enterprises and Caryco, Inc., maintain a Quality Manual and documentation of the fabrication of piece-parts that it sold to SOFCO for use in Gen-Set base and enclosure assemblies. This conduct violated the requirements of MIL-Q-9858A, MIL-I-45208A and MIL-STD-45662, and thus violated the requirements imposed upon SOFCO by GTC's various Purchase Orders for the Gen-Set base and enclosure assemblies. This conduct encompassed all the base and enclosures sold to GTC, which were then used on Gen-Set Units 4 through 79. When SOFCO certified, pursuant to the Certificate of Conformance issued with all completed base and enclosure assemblies, that all requirements imposed on it by GTC's Purchase Orders had been satisfied, such certification was false.

146. Because of SOFCO's failure to supervise its subcontractors in accordance with MIL-Q-9858A, MIL-I-45208A and MIL-STD-45662, its subcontractors routinely performed work for the Gen-Set program that was not in conformance with Government contract requirements. SOFCO subcontractors fabricated Gen-Set component parts without MIL-STD-248 qualified welding procedures and without properly qualifying and certifying individual welders in accordance with MIL-STD-278 and MIL-STD-248. In addition, SOFCO subcontractors did not follow all applicable requirements on the drawings for the Gen-Set base and enclosure assemblies, using partial penetration welds when full penetration welds were required. The failure of SOFCO's subcontractors to follow applicable Government contract requirements encompasses all of the base and enclosures made by SOFCO, and thus encompasses Gen-Set Units 4 through 79.

147. Under the terms of GTC Purchase Orders, SOFCO is required to manufacture Gen-Set base and enclosure assemblies in compliance with the provisions of Government military specifications MIL-STD-278, MIL-STD-248, SNT-TC-1A and MIL-STD-271E. Under these military specifications, SOFCO must properly qualify and certify the individual welders and welding inspectors used on the Gen-Set project. Such proper qualification and certification requires that welders must pass periodic eye examinations.

148. For every Gen-Set base and enclosure assembly it manufactured and sold to GTC, SOFCO used individual welders and welding inspectors who were not properly qualified or certified pursuant to MIL-STD-278, MIL-STD-248, SNT-TC-1A and MIL-STD-271E. When SOFCO certified, pursuant to the Certificate of Conformance issued with all completed base and enclosure assemblies, that all requirements imposed on it by GTC's Purchase Orders had been satisfied, such certification was false.

149. Pursuant to the GTC Purchase Order requirements, SOFCO was required to follow welding and testing procedures in fabricating the Gen-Sets as set forth in MIL-STD-278, MIL-STD-248 and MIL-STD-271F. In contravention of these requirements, SOFCO manufactured the base assemblies, enclosures, and component parts without established welding or testing procedures. Specifically, SOFCO did not follow or complete the travelers for the fabricated base and enclosure assemblies relating to the inspection and testing of SOFCO's work; ignored weld processes contained on drawings, substituting its own weld processes without requesting or receiving drawing changes;

utilized unapproved nondestructive testing procedures; used unqualified personnel to conduct Magnetic Particle inspections and uncertified material to conduct Liquid Penetrant tests; used uncertified filler material and weld wire; ignored and bypassed mandatory hold points for quality inspections; ignored quality inspection sign-offs during fabrication; and failed to conduct longitudinal wave ultrasonic inspections of T-joints. This SOFCO conduct occurred on a regular basis throughout its manufacture of base and enclosure assemblies for Gen-Set Units 4 through 79, and thus none of those units was made in conformance with the requirements called out in GTC's Purchase Orders.

150. SOFCO was required by the terms of the GTC Purchase Orders to adhere to all requirements called for in the prints and drawings associated with the Gen-Set base and enclosure assemblies. Drawing numbers 23036269, 23036319, and 23036399 incorporate MIL-F-18240 regarding the reusability requirement for bolts with hot lock stainless inserts. On at least the base and enclosures used for Gen-Set Units 4 through 10, SOFCO violated this reusability requirement.

151. GTC required by Purchase Order that SOFCO follow applicable prints and drawings. Gen-Set base and enclosure assembly prints required that SOFCO provide an air tight seal on enclosure doors. SOFCO manufactured numerous base and enclosure assemblies, between 1988 and 1995, on which the seals on the enclosure doors were not air-tight. This conduct was in contravention of the print requirements, and thus in contravention of the requirements imposed upon SOFCO by GTC's various Purchase Orders. The lack of an airtight

seal on enclosure doors was discovered and known by GTC through its Receiving Inspector, Quality Control Manager, Project Manager, and Assembly Foreman. GTC notified the SOFCO Quality Manager of this defect.

152. When this defect was discovered, SOFCO's Quality Manager and GTC Quality Personnel attempted to re-work the base and enclosure doors to provide an airtight seal. These efforts were not successful. In addition, the re-working rendered the base and enclosure doors further nonconforming to drawing specifications. All Gen-Sets that used these re-worked base and enclosure assemblies thus violate drawing requirements and associated Purchase Orders.

153. Base and enclosure drawings also required that there be an airtight seal between the base and enclosure. Base and enclosure assemblies made by SOFCO without the required airtight seals between the base and enclosure were shipped to GTC without this defect being cured. GTC, through its Gen-Set assemblers, Assembly Foreman, Project Manager, and Quality Control Manager, discovered such nonconformities on all bases and enclosures shipped to GTC during the time that Relators Sanders and Thacker worked at GTC, up through November, 1995. Thereafter, without fixing this defect, GTC used SOFCO's nonconforming base and enclosure assemblies in assembling completed Gen-Sets. Thus GTC accepted the nonconforming base and enclosure assemblies and used them on Gen-Set Units 4 through 79.

154. Defendants Allison and GTC conducted periodic, usually annual quality audits, beginning in 1988, of SOFCO's manufacturing and testing

processes. Beginning with the first such audit and continuing with every audit thereafter, Allison and GTC found that SOFCO was not manufacturing Gen-Set base and enclosure assemblies in strict accordance with GTC's Purchase Order requirements. Specifically, every Allison and GTC audit revealed that SOFCO was not using certified welders and certified welding inspectors, was not using proper welding procedures, and SOFCO was not properly certifying its subcontractors.

155. Though Allison and GTC thus knew that SOFCO was not properly manufacturing Gen-Set base and enclosure assemblies, they used the nonconforming base and enclosure assemblies on Gen-Sets 4 through 79.

156. None of the base and enclosure assemblies used on Gen-Sets numbered 4 through 79 conformed to GTC Purchase Order requirements. Based upon their periodic audits of SOFCO, Allison and GTC were aware that none of the base and enclosure assemblies used on Gen-Sets numbered 4 through 79 conformed to GTC Purchase Order requirements. All certifications by SOFCO, whether express or implied, that the base and enclosures it delivered to GTC conformed to Purchase Order requirements were false. All certifications by GTC, whether express or implied, that Gen-Sets numbered 4 through 79 conformed to Allison Purchase Order requirements were false. All certifications by Allison, whether express or implied, that Gen-Set numbers 4 through 79 conformed to Bath or Ingalls Purchase Order requirements were false.

157. SOFCO violated the terms of all the GTC Purchase Orders listed at paragraph 50 above. GTC violated the terms of Allison Purchase Orders listed

at paragraph 45 above up to an including Allison P.O. number H319868. Allison violated the terms of all of the Bath and Ingalls Purchase Orders listed at paragraph 36 above. Because of defendants' conduct in manufacturing and using nonconforming Gen-Set base and enclosure assemblies, Bath and Ingalls violated the terms of Government contracts listed at paragraph 31 above up to and including contract number N-00024-93-C-2806.

158. Because of the nonconforming base and enclosure assemblies, all of the claims for payment submitted by Allison, GTC and SOFCO regarding Gen-Set numbers 4 through 79, were knowingly false claims. Defendants' conduct in manufacturing and using nonconforming Gen-Set base and enclosure assemblies knowingly caused Bath and Ingalls to submit false claims in connection with Government contracts listed at paragraph 31 above up to and including contract number N-00024-93-C-2806.

I. Gen-Set Unit 53

159. During the time period from mid-1992 through mid-1994, the United States Navy, at the suggestion and encouragement of Allison and GTC, approved a modification of the design and manufacture of the Gen-Sets. This process resulted in the series 9130 Gen-Sets being replaced by series 9140 Gen-Sets.

160. As part of this redesign process, the Government required and paid defendant GTC to develop and build a mock-up/prototype series 9140 Gen-Set and a separate series 9140 Gen-Set production unit. Defendant GTC built a mock-up/prototype of a series 9140 Gen-Set for presentation to the United States Navy. This mock-up Gen-Set was identified as Unit 53 and was not

built to Government contract and Ship Specifications requirements.

161. Upon approval of the mock-up/prototype, GTC, with Allison knowledge through its Project Manager and Project Engineers present at GTC's Cincinnati facility, billed the Government for both the mock-up/prototype and the production unit but did not build a separate production unit. Rather, GTC simply made some changes to the mock-up/prototype Unit 53 and shipped it for installation in the DDG-69, U.S.S. Milius, in 1994. GTC was thus paid twice for the same unit, though the Government contracted for two distinct units. The billing to the Government for both the mock-up/prototype Unit 53 and the production Unit 53 occurred during approximately 1993 and 1994.

162. Gen-Set Unit 53, was built in 1993 - 1994 as a mock-up prototype of the first 9140 Gen-Set.

163. GTC's Project Manager for the Gen-Sets assigned Relator Thacker, as the designated process engineer, the responsibility of building Unit 53 on an accelerated basis. Pursuant to this responsibility, Relator Thacker knew that Unit 53 had to be built in accordance with Allison Purchase Order number H205948. However, Allison, through its Project Manager, Quality Assurance Manager and Project Engineers, and GTC, through its Quality Control Manager and Project Manager, did not allow Relator Thacker to establish manufacturing, inspection and quality control procedures for fabricating this prototype 9140 Gen-Set. Instead, Relator Thacker was ordered to expedite deliveries of supplies whether or not drawing, Mil-Spec or Purchase Order standards had been met. They had not.

164. Defendants Allison, GTC and SOFCO, thus caused false claims to be submitted in violation of the False Claims Act in connection with the fabrication, construction and assembly of Unit 53. Despite assurances to Relators Sanders and Thacker by GTC's Gen-Set Project Manager and Allison's Chief Engineer that the prototype/mock-up of the 9140 Gen-Set, Unit 53, would be torn apart and reassembled according to the quality requirements and processes, Unit 53 was shipped as assembled with the following defects:

165. Assembly of Unit 53 was begun before new process control documentation (detailing the procedures to be followed in receiving parts and inspection of assembly on the plant floor) had been put in place.

166. Part of the assembly process involved welding components, such as bosses, brackets, drain systems, and gear box pads, to either the Gen-Set base or the enclosure. This required the creation of a Welding Procedure Specification ("WPS") for each weld which identified the fillet material to be used, the essential elements of the weld, the type of weld, the technique to be employed, travel speeds, preparation and cleaning, and joint details. Unit 53 was assembled without WPS's in place.

167. Unit 53 was assembled without assembly instructions, or assembly verification forms (requiring the inspector/operator to make an annotation contemporaneously when a task has been performed thereby providing a tangible record of the quality of the work performed).

168. Unit 53 was assembled without receiving inspections of component parts and piece parts to

ensure their integrity. In addition, Unit 53 was assembled without weld inspection sheets.

169. Unit 53 was assembled without required supplier certifications.

170. Unit 53 was assembled with noncertified material in the fabrication of parts such as brackets and oil coolers.

171. The Unit 53 base and enclosure assembly fabricated by SOFCO was not subject to receiving inspections. Defendant GTC failed to establish quality welding procedures for Unit 53. As a result, Defendant GTC manufactured and shipped Gen-Set unit 53, to Ingalls for installation on the U.S.S. Milius without having established welding procedures.

172. Documentation of the required tests, procedures, and inspections were created after Unit 53 was assembled and shipped for installation.

173. The foregoing factual allegations regarding the improper manufacture and testing of Gen-Set Unit 53 violated the requirements of Allison Purchase Order H205948, Ingalls Purchase Order number M2-03019-011 and Government contract number N-00024-90-C-2800, which all require compliance with Ship Specifications, MIL-Q-9858A, and applicable Gen-Set drawing specifications.

J. Defendants' Conspiracy

174. As detailed above, Allison, GTC and SOFCO all knew that the requirements imposed upon them by Purchase Orders for their work on the Gen-Sets were pursuant to prime Government contracts for the production of Navy destroyers. Again as detailed above, all three defendants violated the

requirements of their respective Purchase Orders, and all three defendants worked closely with one another to conceal the Gen-Set defects from the Government in order to have their claims for payment for the Gen-Sets paid.

175. Allison personnel, specifically its Gen-Set Project Engineers, Quality Assurance Managers and Project Managers, were present at GTC's Cincinnati facility during much of the manufacturing and testing of the Gen-Sets. Both Allison and GTC knew that the Gen-Sets did not conform to Government contract and Purchase Order specifications, yet acted in concert to deliver these nonconforming Gen-Sets to Bath and Ingalls without informing the prime contractors or the United States Navy of the defects in the Gen-Sets. In addition, Allison and GTC, again without informing the prime contractor or the Navy, each made claims for payment under Bath, Ingalls and Allison Purchase Orders that expressly and impliedly certified that the Gen-Sets conformed to Purchase Order requirements when they did not. And by together concealing Gen-Set defects, Allison and GTC were able to get false claims paid by the Government to Bath and Ingalls for Navy destroyers that did not—because of the defective Gen-Sets contained therein—conform to the Government's contract requirements.

176. As outlined above, each Gen-Set Units 1 through 82, covering the time that Relators Sanders and Thacker worked at GTC, did not conform to Government contract and Purchase Order requirements. The concerted actions of Allison and GTC in hiding these nonconformities from the Government and yet making and getting false claims for payment allowed encompasses Units 1 through

82. Thus, Allison and GTC conspired to violate the Government contract numbers and Bath, Ingalls and Allison Purchase Orders associated with Units 1 through 82.

177. SOFCO also acted in concert with Allison and GTC to get claims for payment for the Gen-Sets approved. As outlined above, Allison and GTC conducted regular audits of SOFCO's manufacturing and testing processes, finding on each occasion that SOFCO was not, among other things, using certified welders and certified welding inspectors in making the base and enclosure assemblies for the Navy Gen-Sets. Though this conduct was in direct violation of Government contract and GTC Purchase Order requirements, Allison, GTC and SOFCO together hid such violations from the Government, never informing the Navy of these actions. By concealing this information, Allison, GTC and SOFCO were all able to get their claims for payment for their work associated with the Navy Gen-Set project paid. And, in turn, Bath and Ingalls were paid for new destroyers that were no in compliance with Government contract requirements.

178. As outlined above, each Gen-Set Units 1 through 79, covering the time that SOFCO made the Gen-Set base and enclosures under GTC Purchase Orders, did not conform to Government contract and Purchase Order requirements. The concerted actions of Allison, GTC and SOFCO in hiding these nonconformities from the Government and yet making and getting false claims for payment allowed encompasses Units 1 through 79. Thus, Allison, GTC and SOFCO conspired to violate the Government contract numbers and Bath, Ingalls and

Allison Purchase Orders associated with Units 1 through 79.

COUNT I
FALSE CLAIMS ACT VIOLATIONS
UNDER 31 U.S.C. §§ 3729(a)(1)

179. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

180. Defendants Allison, GTC and SOFCO, by and through their officers, agents, and employees, knowingly presented or caused to be presented to the United States Government or a member of the Armed Forces, false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1) by virtue of the conduct alleged above.

181. The United States has been damaged as a result of Defendants' individual and collective violations of the False Claims Act.

182. As set forth in the preceding paragraphs, Defendants Allison, GTC and SOFCO have knowingly violated 31 U.S.C. §§ 3729(a)(1) and have thereby damaged the United States Government by their actions in an amount to be determined at trial.

COUNT II
FALSE CLAIMS ACT VIOLATIONS
UNDER 31 U.S.C. §§ 3729(a)(2)

183. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

184. Defendants Allison, GTC and SOFCO, by and through their officers, agents, and employees, knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the United States Government in violation of 31 U.S.C. § 3729(a)(2).

185. Defendant GTC made or caused to be made false records or statements, including, but not limited to, Certificates of Conformance, Assembly Instructions, Piece Part Process documents or travelers, Statements of Work, forms DD-250, and other documents representing that the Gen-Sets were built to required contract standards and specifications, knowing that these documents were not being followed, to get false or fraudulent claims paid or approved by the United States Government in violation of 31 U.S.C. § 3729(a)(2).

186. Defendant Allison made or caused to be made false records or statements, including, but not limited to, Certificates of Conformance, Statements of Work and other documents representing that the Gen-Sets were built to required contract standards and specifications, knowing that these documents were not being followed, to get false or fraudulent claims paid or approved by the United States Government in violation of 31 U.S.C. § 3729(a)(2).

187. Defendant SOFCO made or caused to be made false records or statements, including, but not limited to, Certificates of Conformance and other documents representing that the Gen-Sets were built to required contract standards and specifications, knowing that these documents were not being followed, to get false or fraudulent claims paid or approved by the United States Government in violation of 31 U.S.C. § 3729(a)(2).

188. The United States has been damaged as a result of Defendants' individual and collective violations of the False Claims Act.

189. As set forth in the preceding paragraphs, Defendants have knowingly violated 31 U.S.C. §§ 3729(a)(2) and have thereby damaged the United

States Government by their actions in an amount to be determined at trial.

COUNT III
FALSE CLAIMS ACT VIOLATIONS
UNDER 31 U.S.C. §§ 3729(a)(3)

190. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

191. In the factual allegations set forth above, defendants Allison, GTC and SOFCO, by and through their officers, agents, and employees, conspired to defraud the United States Government by getting false or fraudulent claims allowed or paid in violation of 31 U.S.C. § 3729(a)(3).

192. Defendants, by and through their officers, agents, and employees, authorized their various officers, agents, and employees to take the actions set forth above.

193. The United States has been damaged as a result of Defendants' individual and collective violations of the False Claims Act.

194. As set forth in the preceding paragraphs, Defendants have knowingly violated 31 U.S.C. §§ 3729(a)(3) and have thereby damaged the United States Government by their actions in an amount to be determined at trial.

COUNT IV
RETALIATION AGAINST RELATOR THACKER
31 U.S.C. § 3730(h)

195. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

196. From approximately 1988, Relator Thacker repeatedly complained to his supervisors and other

employees at GTC about Defendant GTC's unlawful activities in violation of the duties referenced above.

197. On or about March 21, 1994, a GTC manager overheard Relator Thacker discussing with Relator Sanders disclosing to the Government Defendants' noncompliance with contract requirements.

198. Beginning in April, 1994, Relators Thacker and Sanders worked with the Naval Criminal Investigative Service in its investigation into the construction, testing and assembly of the Gen-Sets.

199. Defendant GTC hired attorneys and investigators to question Relator Thacker about his knowledge of the violations of contract requirements and specifications in the construction, testing and assembly of the Gen-Sets. This culminated in an interview of Relator Thacker in August, 1995.

200. Soon thereafter, in November, 1995, Defendant GTC discharged Relator Thacker because of his lawful acts undertaken in furtherance of this *qui tam* action pursuant to 31 U.S.C. § 3729 *et seq.*, including, investigation for, initiation of, testimony for, or assistance in this action, in violation of 31 U.S.C. § 3730(h).

201. All actions undertaken by Relator Roger Thacker that gave rise to his discharge by Defendant GTC were taken in an attempt to assure compliance with the terms of the government contract pertaining to the manufacture, assembly, and quality assurance requirements for the Gen-Set as well as his actions in furtherance of Relator's *qui tam* action under the False Claims Act.

202. Defendant GTC's discharge of Relator Roger Thacker was designed to threaten, harass, and

discriminate against Relator in violation of 31 U.S.C. § 3730(h), in order to intimidate Relator Thacker and prohibit him from sharing information with the United States.

203. Pursuant to 31 U.S.C. § 3730(h), Relator Thacker is entitled to all relief necessary to make him whole and to damages resulting to his reputation and continued career opportunities as a result to Defendant GTC's illegal discharge, including litigation costs and reasonable attorneys' fees.

COUNT V
PUBLIC POLICY TORT OF RELATOR THACKER

204. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

205. Defendant GTC had a duty under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and Ohio Revised Code § 2921.13 to refrain from knowingly making false statements to representatives of the United States concerning compliance with the requirements of the Navy contract for the construction of the Gen-Sets, such as on DD Forms 250.

206. Defendant GTC had a duty under Ohio Revised Code § 4113.52, to refrain from taking retaliatory actions against employees who report potential violations of law which are likely to cause a hazard to public health or safety or which may be a felony.

207. Defendant GTC's actions in violation of the terms of the Navy contract pose a hazard to the public health and safety, including the health and

safety of the Navy personnel serving on the destroyers, and may constitute a felony.

208. GTC had a duty under the False Claims Act, 31 U.S.C. § 3730(h), to refrain from taking retaliatory actions against employees who take lawful actions in furtherance of a False Claims Act action, including investigation for, initiation of, testimony for, or assistance in an action filed under the False Claims Act.

209. In retaliation against Relator Thacker, for his attempts to bring GTC into compliance with the requirements and specifications in the manufacture, assembly and testing of the Gen-Sets as outlined above, GTC discharged Relator Thacker in November, 1995.

210. These actions are in direct violation of the public policy of the State of Ohio under the principles enunciated in *Sabo v. Schott*, 70 Ohio St. 3d 527, 639 N.E.2d 783 (1994) and in Ohio Revised Code §2921.13.

211. GTC's retaliatory actions against Relator Thacker are in direct violation of the public policy of the State of Ohio and have caused Relator damages under the principles enunciated in *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990) and *Painter v. Graley*, 70 Ohio St. 3d 376, 639 N.E.2d 51 (1994).

212. GTC's retaliatory actions against Relator Thacker are in direct violation of the public policy of the State of Ohio and have caused Relator damages, under the principles enunciated in 31 U.S.C. § 3729 *et seq*. including 31 U.S.C. § 3730(h).

COUNT VI
RETALIATION AGAINST RELATOR SANDERS
31 U.S.C. § 3730(h)

213. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

214. For a period of approximately two years prior to his discharge, Relator Sanders repeatedly complained to his superiors and other employees at GTC about Defendant GTC's unlawful activities in violation of the duties referenced above.

215. Approximately ten days before Defendant GTC discharged Relator Sanders, a GTC manager overheard Relator Sanders discussing with Relator Thacker disclosing to the government GTC's noncompliance with the Navy contract requirements and specifications.

216. Defendant GTC discharged Relator Sanders on March 31, 1994, one week before an Allison audit team was scheduled to inspect Gen-Sets and associated paperwork.

217. Relator Sanders was discharged by GTC because of his lawful acts undertaken in furtherance of Relator's *qui tam* action pursuant to 31 U.S.C. § 3729 *et seq.*, including investigation for, initiation of, testimony for, or assistance in this action, in violation of 31 U.S.C. § 3730(h).

218. All actions undertaken by Relator Sanders that gave rise to his discharge by Defendant GTC were taken in an attempt to assure compliance with the terms of the government contract pertaining to the manufacture, assembly, and quality assurance requirements for the Gen-Sets as well as his actions in furtherance of Relator's *qui tam* action under the False Claims Act.

219. Defendant GTC's discharge of Relator Sanders was designed to threaten, harass, and discriminate against Relator Sanders in violation of 31 U.S.C. § 3730(h), in order to intimidate Relator Sanders and prohibit him from sharing information with the United States.

220. Pursuant to 31 U.S.C. § 3730(h), Relator Sanders is entitled to all relief necessary to make him whole and to damages resulting to his reputation and continued career opportunities as a result of Defendant GTC's illegal discharge, including litigation costs and reasonable attorneys' fees.

COUNT VII
PUBLIC POLICY TORT OF RELATOR SANDERS

221. The allegations contained in the preceding paragraphs are realleged as if fully set forth below.

222. Defendant GTC had a duty under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and Ohio Revised Code § 2921.13 to refrain from knowingly making false statements to representatives of the United States concerning compliance with the requirements of the Navy contract for the construction of the Gen-Sets, such as on DD Forms 250.

223. Defendant GTC had a duty under Ohio Revised Code § 4113.52, to refrain from taking retaliatory actions against employees who report potential violations of law which are likely to cause a hazard to public health or safety or which may be a felony.

224. Defendant GTC's actions in violation of the terms of the Navy contract pose a hazard to the

public health and safety, including the health and safety of the Navy personnel serving on the destroyers, and may constitute a felony.

225. GTC had a duty under the False Claims Act, 31 U.S.C. § 3730(h), to refrain from taking retaliatory actions against employees who take lawful actions in furtherance of a False Claims Act action, including investigation for, initiation of, testimony for, or assistance in an action filed under the False Claims Act.

226. In retaliation against Relator Sanders, for his attempts to bring GTC into compliance with the requirements and specifications in the manufacture, assembly and testing of the Gen-Sets as outlined above, GTC discharged Relator Sanders on March 31, 1994.

227. These actions are in direct violation of the public policy of the State of Ohio under the principles enunciated in *Sabo v. Schott*, 70 Ohio St. 3d 527, 639 N.E.2d 783 (1994) and in Ohio Revised Code §2921.13.

228. GTC's retaliatory actions against Relator Sanders are in direct violation of the public policy of the State of Ohio and have caused Relator damages under the principles enunciated in *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990) and *Painter v. Graley*, 70 Ohio St. 3d 376, 639 N.E.2d 51 (1994).

229. GTC's retaliatory actions against Relator Sanders are in direct violation of the public policy of the State of Ohio and have caused Relator damages, under the principles enunciated in 31 U.S.C. § 3729 *et seq.* including 31 U.S.C. § 3730(h).

PRAYER

230. Relators, on behalf of themselves and the United States Government, pray:

(a) That this Court enter judgment against the Defendants jointly and severely in an amount equal to three times the amount of damages the United States Government has sustained because of Defendants' actions, plus a civil penalty of $5,000 to $10,000 for each action in violation of 31 U.S.C. § 3729, and the costs of this action, with interest, including the costs to the United States Government for its expenses related to this action;

(b) That the Relators be awarded all costs incurred, including reasonable attorneys' fees;

(c) That, in the event the United States Government elects to proceed with this action, the Relators be awarded an amount for bringing this action of at least 15%, but not more than 25%, of the proceeds of the action or settlement of the claim;

(d) That, in the event the United States does not proceed with this action, the Relators be awarded an amount that the Court decides is reasonable for collecting the civil penalty and damages, which shall be not less than 25% nor more than 30% of the proceeds of the action of the settlement;

(e) That the Relators be awarded prejudgment interest;

(f) That the United States Government and the Relators receive all relief, both law and in equity, to which they may reasonably appear entitled.

WHEREFORE, on Counts IV and V, Relator Thacker prays:

231. That Relator Thacker be awarded all compensatory and punitive damages, including personal injury damages for pain and suffering and loss of reputation for which he is entitled pursuant to 31 U.S.C. § 3730(h) and other applicable law;

232. That Relator Thacker be awarded all relief necessary to make him whole, including but not limited to, reinstatement with the same seniority status as he would have had but for the retaliation, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the retaliation, pursuant to 31 U.S.C. § 3730(h);

233. That Relator Thacker be awarded all of the damages to which he is entitled in accord with Ohio's Public Policy Tort, as set forth in Count V;

234. That Relator Thacker be awarded all litigation costs and reasonable attorneys' fees incurred as provided pursuant to 31 U.S.C. § 3730(h) and other applicable law;

235. That Relator Thacker receive all relief, both at law and at equity to which he may reasonably appear entitled.

WHEREFORE, on Counts VI and VII, Relator Sanders prays:

236. That Relator Sanders be awarded all compensatory and punitive damages, including personal injury damages for pain and suffering and loss of reputation for which he is entitled pursuant to 31 U.S.C. § 3730(h) and other applicable law;

237. That Relator Sanders be awarded all relief necessary to make him whole, including but not limited to, reinstatement with the same seniority status as he would have had but for the retaliation, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the retaliation, pursuant to 31 U.S.C. § 3730(h);

238. That Relator Thacker be awarded all of the damages to which he is entitled in accord with Ohio's Public Policy Tort, as set forth in Count VII;

239. That Relator Sanders be awarded all litigation costs and reasonable attorneys' fees incurred as provided pursuant to 31 U.S.C. § 3730(h) and other applicable law;

240. That Relator Sanders receive all relief, both at law and at equity to which he may reasonably appear entitled.

Respectfully submitted,

/s/

James B. Helmer, Jr. (0002878)
Paul B. Martins (0007623)
Robert M. Rice (0061803)
Trial Attorneys for Relators
HELMER, MARTINS & MORGAN CO., L.P.A.
Fourth & Walnut Centre, Suite 1900
105 East Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2400

Scott Powell, Esq.
Don McKenna, Esq.
Attorneys for Relators
HARE, WYNN, NEWELL & NEWTON, LLP
The Massey Building, Suite 800
290 21st Street, North
Birmingham, AL 35203-3713
Telephone: (205) 328-5330

Trial Transcript Excerpt

[Pages 90-96]

* * *

FEBRUARY 10, 2005 SANDERS v. ALLISON

WHEREUPON:

CHRIS KROHNE

a witness herein, of lawful age, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POWELL:

Q. Good afternoon, sir.

A. Good afternoon..

Q. Give us your name, please.

A. My name is Chris Krohne.

Q. Mr. Krohne, my name is Scott Powell. We have not had the pleasure of meeting, have we, sir?

A. No, we have not.

Q. You are employed by Rolls Royce. Is that correct?

A. Rolls Royce.

Q. As I understand, at least in the relevant time frame that we're talking about, with respect to the generator sets on the Arleigh Burke Destroyer Project, you were program manager for a period of time. Is that right?

A. I was program manager for the period after 1990.

Q After 1990, okay.

Q. Is that the job that you held continuously, at least through 1996, as program manager?

A. Yes.

Q. And, I guess, 1990, you would have been working actually for GM or the Allison division of GM?

A. In 1990, we were Allison Gas Turbine, a division of General Motors.

Q. Then, I take it, Allison was independent for awhile and then was purchased by Rolls Royce. Is that accurate?

A. We were sold in 1994, owned by Clayton, Dubelier & Rice for one year, then purchased by Rolls Royce.

Q. Then purchased by Rolls Royce. All right, sir.

Prior to 1990 and with you becoming program manager, what position did you hold with respect to the generator set project?

A. I came to Rolls Royce in 1984 and we bid on this job the following year. And I had come with an electrical background. I did a lot of electrical engineering work on the job prior to becoming the program manager in 1990.

Q. And in terms of electrical engineering, did you have a specific title that you can share with us during that time frame?

A. Well, my specific title was project engineer.

Q. Help me through this, if you would, just so we can get some basics down as we go through your examination and our discussions this afternoon.

I think you indicated that you were in the electrical engineering arena when you bid -- or when Allison, I take it, bid on the project in 1984, '85, in that time frame. Is that right?

A. I had a strong electrical background as far as my engineering background.

Q. As I understand how this process works, if the Navy decides they're going to build a class of destroyers and they're going to go to a shipyard and discuss with the shipyard -- bid out a contract, the shipyard then will go to various suppliers and vendors around the country perhaps to assist the shipyard in constructing these destroyers. Is that right?

A. That's correct.

Q. And am I correct in understanding that -- and we'll go through the documents, but just to give all of us an overview. Am I correct in understanding that the Navy in this particular case hired a contractor with Bath Iron Works in Bath, Maine? Is that right?

A. Correct.

Q. And then Bath contracted with Allison, at least in terms of the generator sets for the gen sets on the ships?

A. That's correct.

Q. And among the vendors that Allison hired or contracted with was General Tool?

A. General Tool.

Q. And then General Tool contracted, I guess, with SOFCO for the fabrication on the bases and enclosures, among others?

A. Among others.

Q. Is that right?

A. Mm-hmm.

Q. Generally speaking, on this particular project, then -- again, we'll get to this as we go through it, but just so we have an overview and we're talking in the overview context right now, Mr. Krohne. I take it that, when product would be delivered from one vendor to another and on up the line as the parts are shipped together and then end up in Bath, Maine, or in Pascagoula at Engles for construction in the overall ship as different levels of production are reached, the money as it would flow would come from the Navy or the Treasury Department, taxpayer money, to Bath. That would be sort of the first step. Is that right?

A. Well, you left out, it flows from the taxpayers to the Congress to the Department of Navy to Bath, then us, to --

Q. But, eventually, it's our money, isn't it?

A. Yours and mine.

Q. Right.

So it comes from the Navy or the Treasury Department to Bath?

A. Yes.

Q. And then, depending on what milestone or level of production is reached, Bath would then – let's take just in the gen set project itself. Bath would pay Allison?

A. Bath pays Allison.

Q. And then, again, Bath is paying Allison with what originally was our money. Right?

A. Yes.

Q. Allison would pay General Tool?

A. Allison would pay General Tool.

Q. Again, with what was originally our money?

A. Yes.

Q. General Tool would pay SOFCO?

A. Yes.

Q. Again, originally with what was our money?

A. Yes.

Q. So all the dollars we're talking about, at least in terms of the product that is being sold and the product that is being purchased, is taxpayer dollars? I'm not talking about warranties, I'm not talking about repairs, I'm just talking about for the product that is purchased and sold is taxpayer dollars.

A. Yes, more or less.

Q. All right, sir. Again, remember, I started this off, as a general overview, so that we all understand the process.

A. Okay.

Q. Am I accurate in describing it as we have described it that, in terms of what is product that is sold and purchased, is taxpayer dollars?

A. Yes.

Q. Okay, great.

To get a little bit more specific, in terms of how this starts off --.

MR. POWELL: Let's see Exhibit 128, please. And, by the way, I think you have the -- I think he's got the binder, but I'm not sure that's --

THE COURT: Do you want to check, counsel?

MR. POWELL: I was going to, if I may approach.

THE COURT: You may approach.

THE WITNESS: I'm not going to be able to read that.

MR. POWELL: What we have is, there are hard documents, Mr. Krohne. The hard documents are in that binder right in front of you, sir. Then a copy will be placed on the computer screen in front of you. We will blow up portions that I will ask you to refer to, o if you need any other portions illuminated, we can certainly do that. If you'll just ask, we'll be happy to do that for you also. All right, sir?

THE WITNESS: All right. BY MR. POWELL:

Q. Exhibit 128 – again, we're talking about how this project starts. This is a solicitation from the Navy to Bath Iron Works for this particular project. Is that correct, sir?

A. You're going to have to point it here. I can't read this one.

MR. POWELL: I don't think he's looking at the right page of the binder.

THE WITNESS: No, I'm not, so –

MR. POWELL: I called out an exhibit number. We'll go describe it.

THE COURT: All right.

PETITIONER'S BRIEF

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46 pgs

No. 07-214

FILED
DEC 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

[Additional Counsel Listed on Inside Cover]

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

QUESTION PRESENTED

Whether a plaintiff asserting a cause of action under Section 3729(a)(2) or Section 3729(a)(3) of the False Claims Act is required to prove that a false claim was submitted to the federal government, or whether it is sufficient to establish that the claim was paid using federal funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, General Motors Corporation, General Tool Company, and Southern Ohio Fabricators, Inc., were defendants-appellees below and are petitioners in this Court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. SECTIONS 3729(a)(2) AND (a)(3) REQUIRE PROOF THAT A FALSE CLAIM WAS SUBMITTED TO THE GOVERNMENT OR THAT A DEFENDANT PARTICIPATED IN A CONSPIRACY TO SUBMIT SUCH A CLAIM 12

A. Section 3729(a)(2) Requires The Submission Of A False Claim To The Government For Payment Or Approval 13

B. Section 3729(a)(3) Requires A Conspiracy To Submit A False Claim To The Government 29

II. THE DECISION OF THE COURT OF APPEALS DRAMATICALLY EXPANDS THE FCA'S SCOPE BEYOND THE LIMITS ESTABLISHED BY CONGRESS 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES

Beck v. Prupis, 529 U.S. 494 (2000).....29

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).....20

Forsham v. Harris, 445 U.S. 169 (1980).....14, 16

Head v. N.M. Bd. of Exam'rs in Optometry, 374 U.S. 424 (1963).....33

Hibbs v. Winn, 542 U.S. 88 (2004).....18

Metric Constructors, Inc. v. United States, 314 F.3d 578 (Fed. Cir. 2002).....35

Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799 (2007).....29

Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975).....28

Rainwater v. United States, 356 U.S. 590 (1958).....33

Rex Trailer Co. v. United States, 350 U.S. 148 (1956).....25

Sullivan v. Stroop, 496 U.S. 478 (1990).....13

Tanner v. United States, 483 U.S. 107 (1987).....9, 15, 16, 23, 31

United States v. Azzarelli Constr. Co., 647 F.2d 757 (7th Cir. 1981).....28

United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986).....36

United States v. Beasley,
550 F.2d 261 (5th Cir. 1977).....28

United States v. Bornstein,
423 U.S. 303 (1976).....3

United States v. Catena,
500 F.2d 1319 (3d Cir. 1974).....28

United States v. Gibbs,
704 F.2d 464 (9th Cir. 1983)
(per curiam).....35

United States v. McNinch,
356 U.S. 595 (1958).....3, 26, 32

United States v. Nordic Vill., Inc.,
503 U.S. 30 (1992).....20

United States v. Orleans,
425 U.S. 807 (1976).....16, 33

United States v. Rivera,
55 F.3d 703 (1st Cir. 1995).....25

United States ex rel. Atkins v. McInteer,
345 F. Supp. 2d 1302 (N.D. Ala. 2004),
aff'd, 470 F.3d 1350 (11th Cir. 2006).....29

United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.,
459 F. Supp. 2d 1081 (D. Kan. 2006).....30

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943).....25, 28

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004),
cert. denied, 544 U.S. 1032 (2005).....
.....6, 7, 16, 17, 20, 21, 34

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 19

STATUTES

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 21

3 U.S.C. § 108(a) 14

5 U.S.C. § 3371 14

5 U.S.C. § 4101(3) 13

5 U.S.C. § 5724(a) 14

5 U.S.C. § 5725(a) 14

5 U.S.C. § 5911(a)(1) 13

10 U.S.C. § 2306a 5

12 U.S.C. § 244 14

18 U.S.C. § 371 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2671 14

31 U.S.C. § 3729 2

31 U.S.C. § 3729(a) 4

31 U.S.C. § 3729(a)(1) ..... *passim*

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) ..... *passim*

31 U.S.C. § 3729(c) 7, 14, 18

31 U.S.C. § 3730(b)(1) 4

31 U.S.C. § 3730(b)(2) 4

31 U.S.C. § 3730(b)(4) 4

31 U.S.C. § 3730(d)(1)-(2) 4

41 U.S.C. § 103 14

41 U.S.C. § 115(a) 14

REGULATIONS

28 C.F.R. § 85.3(a)(9) 4

OTHER AUTHORITIES

Cong. Globe, 37th Cong., 3d Sess. (1863) 33

H.R. Rep. No. 97-651 (1982) 15, 22

H.R. Rep. No. 99-660 (1986) 26

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The court of appeals' opinion is reported at 471 F.3d 610. Pet. App. 1a. The order denying the petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 62a. The opinion of the United States District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569. *Id.* at 38a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on December 19, 2006. It denied petitioners' timely petition for rehearing and petition for rehearing en banc on April 20, 2007. On June 27, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to August 20, 2007. No. 06A1227. The petition for a writ of certiorari was filed on August 17, 2007, and granted on October 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

STATEMENT

The False Claims Act ("FCA") provides the United States with a remedy for "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). This specialized statute does not provide a remedy, however, for fraud perpetrated by one private party against another—a matter that rests principally within the traditional province of the States. The Sixth Circuit nevertheless held that Sections 3729(a)(2) and (a)(3) of the FCA encompass acts of fraud between private parties where the plaintiff can "show that government money was used to pay [a] false or fraudulent claim," even if no claim was ever submitted to the government itself. Pet. App. 23a. The Sixth Circuit's expansive reading of the FCA extends the statute to *any* claim submitted to a recipient of federal funds, including state and local governments, educational institutions, and private businesses.

The Sixth Circuit's holding that a plaintiff asserting a cause of action under Section 3729(a)(2) or (a)(3) of the FCA need not establish that a false claim was submitted to the federal government, or that the defendant participated in a conspiracy to submit such a claim, is at odds with the language, structure, and history of the FCA, and should be reversed.

1. Congress enacted the FCA in 1863 in response to the extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976). As amended, the statute provides the federal government with a cause of action against anyone who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or ap-

proval" (31 U.S.C. § 3729(a)(1)), or who "knowingly makes [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* § 3729(a)(2). The statute also provides a cause of action against persons who "conspire[ ] to defraud the Government by getting a false or fraudulent claim allowed or paid." *Id.* § 3729(a)(3).

An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." 31 U.S.C. § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the suit. *Id.* § 3730(b)(4).

A defendant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

2. Petitioners Allison Engine Company, Inc., General Tool Company, and Southern Ohio Fabricators, Inc., served as three of the hundreds of subcontractors responsible for a portion of the construction

of the U.S. Navy's Arleigh Burke-class Guided Missile Destroyers. Pet. App. 2a. The two private shipyards that were prime contractors on the project subcontracted construction of the generator sets—which produce the ships' electrical power—to Allison Engine (then a subdivision of petitioner General Motors Corporation). *Id.* Allison Engine then subcontracted part of its responsibilities to General Tool, which in turn subcontracted a portion of its work to Southern Ohio Fabricators. *Id.*

Respondents, former employees of General Tool, filed this suit under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA, alleging that petitioners defrauded the federal government by making claims for payment under their subcontracts with the knowledge that their work did not conform to contractual specifications. Pet. App. 3a. After reviewing the complaint, the United States declined to intervene in the suit. *Id.*[1]

3. After respondents had presented their case to a jury, the United States District Court for the Southern District of Ohio granted petitioners' motion for judgment as a matter of law because respondents failed to introduce evidence that any claim for payment had ever been submitted to the federal government for payment or approval. Pet. App. 60a. Respondents established that Southern Ohio Fabricators had submitted claims to General Tool, that General Tool had submitted claims to Allison Engine, and that Allison Engine had submitted claims

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[1] Respondents also brought claims under the Truth in Negotiations Act, 10 U.S.C. § 2306a. The Sixth Circuit affirmed the district court's grant of summary judgment to petitioners on those claims (Pet. App. 33a), and they are no longer at issue in this case.

to the two prime contractors. There was no evidence, however, that any claims for payment had been submitted to the federal government, either by petitioners themselves or by the prime contractors. *Id.* at 59a.

Finding the D.C. Circuit's opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005), to be "persuasive," the district court held that submission of the allegedly false claims to the government was an element of the FCA causes of action that respondents were asserting under Sections 3729(a)(1), (a)(2), and (a)(3). Pet. App. 56a. In the absence of any evidence that a claim for payment had been submitted to the government, the court concluded that respondents' claims failed as a matter of law. *Id.* at 60a.

4. A divided panel of the Sixth Circuit reversed. The court of appeals held that, although Section 3729(a)(1) does require the submission of a false claim to the government, Sections 3729(a)(2) and (a)(3) do not require proof that a false claim was ever submitted to the federal government for payment or approval. Pet. App. 10a. According to the panel majority, Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds," even if no claim ever passes in front of a government official. *Id.* at 9a.

The Sixth Circuit based this holding on its reading of the statutory language of Sections 3729(a)(1) through (a)(3), and its conclusion that "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government." Pet. App. 7a. The panel majority found unpersuasive petitioners'

argument that the language "paid or approved by the Government" in Section 3729(a)(2) requires the submission of a claim to the federal government for payment or approval. *Id.* at 15a. According to the panel majority, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever it is "paid with government funds." *Id.* at 8a.

The Sixth Circuit attempted to bolster its reading of Sections 3729(a)(2) and (a)(3) by invoking the definition of "claim" in Section 3729(c). 31 U.S.C. § 3729(c). Reading Section 3729(c) in isolation from the liability-creating language of Sections 3729(a)(2) and (a)(3), the panel majority found "nothing in this language to suggest the claim must be shown to have been presented to the government, so long as it can be shown that the claim was paid with government funds." Pet. App. 8a. This conclusion was "solidifie[d]," the panel majority asserted, by the legislative history accompanying the 1986 amendments to the FCA. *Id.*

The Sixth Circuit also rejected petitioners' argument that, if a claim need not be submitted to the government under Section 3729(a)(2), "the presentment requirement in subsection (a)(1) [would be] 'largely meaningless.'" Pet. App. 12a (quoting *Totten*, 380 F.3d at 501). The panel majority contended that "[S]ection (a)(2) contains its own more burdensome requirement" not found in Section 3729(a)(1)—*i.e.*, that "the claim must have actually been paid"—and that a requirement that a claim be submitted to the government under Section 3729(a)(2) was thus unnecessary to prevent litigants from circumventing the presentment requirement in Section 3729(a)(1). *Id.*

The Sixth Circuit therefore concluded that submission of a claim to the government is not an element of the causes of action under Sections 3729(a)(2) and (a)(3), and reversed the judgment as a matter of law in favor of petitioners. Respondents' claims under Sections 3729(a)(2) and (a)(3) should reach a jury, the Sixth Circuit held, because "[d]uring trial, [respondents] put forth evidence that all of the money paid to [petitioners] came from the United States government." Pet. App. 24a.

Judge Batchelder dissented, and would have held that a claim must be submitted to the government in order to impose liability under Sections 3729(a)(1), (a)(2), and (a)(3) of the FCA. Pet. App. 33a. Judge Batchelder emphasized that the plain language of the FCA distinguishes between allegations that a defendant defrauded the federal government—which can support FCA liability—and allegations that a defendant defrauded a federal grantee—which cannot. *Id.* at 34a-35a. "Payment of a claim 'by the government'" under Section 3729(a)(2), Judge Batchelder reasoned, "presupposes that the claim has been presented to the government as a request for that payment." *Id.* at 34a. Disagreeing with the panel majority's assertion that any claim paid with federal funds can be deemed "paid . . . by the Government," Judge Batchelder responded that the "term 'by the Government' is not the same as 'with government funds.'" *Id.* She also emphasized that the panel majority's effort to prevent evasion of Section 3729(a)(1)'s presentment requirement was unavailing because the only authority that the majority cited to support the proposition that a "claim must have actually been paid" to give rise to Section 3729(a)(2) liability actually stood for the contrary proposition that payment is not required. *Id.* at 36a.

Because respondents "not only failed but actually refused to produce any evidence that any claim was presented . . . to the government for payment," Judge Batchelder would have affirmed the judgment in favor of petitioners. Pet. App. 37a.

SUMMARY OF ARGUMENT

I. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) of the FCA encompass any false claim paid with government funds—regardless of whether that claim was ever submitted to the federal government—cannot be reconciled with the language, structure, or history of the FCA.

A.1. Section 3729(a)(2) imposes liability where a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved *by the Government.*" 31 U.S.C. § 3729(a)(2) (emphasis added). That language unambiguously requires the submission of a false claim to the government itself for payment or approval. If Congress had intended to extend Section 3729(a)(2) to any claim submitted to a private entity that receives federal funds, it would have provided for the statute to apply to any claim "paid with Government funds" or any claim "paid or approved by the Government or by a recipient of Government funds." Its decision not to do so is controlling here.

Indeed, both Congress and this Court are well aware of the distinction between the federal government and private entities that receive federal funding. In *Tanner v. United States*, 483 U.S. 107 (1987), for example, this Court held that a conspiracy to defraud a federally funded private entity does not constitute a "conspir[acy] . . . to defraud the United States." *Id.* at 129. A claim can therefore be "paid or

approved by the Government" within the meaning of Section 3729(a)(2) only when it is submitted to the government itself for payment or approval.

2. This reading of the plain language of Section 3729(a)(2) is confirmed by the FCA's statutory structure and the provision's legislative origins.

If Section 3729(a)(2) did not require the submission of a false claim to the government, then plaintiffs would be able to circumvent the requirement in Section 3729(a)(1) that a claim be "present[ed]" to the government by simply filing suit under Section 3729(a)(2). Such a result would conflict with this Court's consistent admonition that a statute should not be interpreted in a manner that would effectively nullify one of its sections.

Properly construed, Sections 3729(a)(1) and (a)(2) serve complementary functions. Section 3729(a)(1) applies to persons who submit a false claim to the government (or cause such a claim to be submitted), while Section 3729(a)(2) applies to persons who make a false statement to obtain payment or approval of a false claim that has been submitted to the government. Together, the provisions reach both defendants who submit false claims and defendants who make false statements in order to secure the payment of such claims.

This reading is confirmed by the legislative origins of Sections 3729(a)(1) and (a)(2), which were originally part of a single, lengthy sentence that unambiguously made submission of a claim to the government an element of both causes of action and that was recodified without substantive change.

3. None of the Sixth Circuit's reasons for adopting a contrary reading of Section 3729(a)(2) is persuasive.

The Sixth Circuit disregarded the plain language of Section 3729(a)(2) and impermissibly substituted "anyone receiving federal financial assistance" for the phrase the "Government." Neither the definition of "claim" in Section 3729(c) nor the legislative history of the 1986 amendments to the FCA supports this countertextual reading of Section 3729(a)(2). Congress added the definition of "claim" to make clear that Section 3729(a)(2) reaches false claims that are initially submitted to a federally funded private entity and then passed along to the government, not to extend the statute to any claim paid by a private entity with funds that originated from the government.

B. The Sixth Circuit's reading of Section 3729(a)(3) is equally unpersuasive. The scope of liability under that derivative conspiracy provision is defined by the scope of liability under Sections 3729(a)(1) and (a)(2). Because a claim must be submitted to the government under those two sections, Section 3729(a)(3) applies only to conspiracies to submit a false claim to the government. The plain language of Section 3729(a)(3)—which encompasses "conspir[acies] to defraud the Government," rather than conspiracies to defraud recipients of federal funding—confirms this interpretation.

Because respondents failed to introduce any evidence at trial that false claims were submitted to the federal government—either by petitioners themselves or by the project's prime contractors—petitioners were entitled to judgment as a matter of law on respondents' claims under Sections 3729(a)(2) and (a)(3).

II. The Sixth Circuit's expansive interpretation of the FCA extends the statute to a vast array of con-

duct that Congress never intended it to reach. For example, if the decision below is affirmed, Sections 3729(a)(2) and (a)(3) will apply to *any* claim for payment submitted to any state or local government, any educational institution, or any private business that receives federal funding. Alleged fraud between private parties, however, is properly redressed under state law, not under the specialized liability provisions of the FCA.

Reversal is required to restore the textual bounds that Congress imposed on the scope of the FCA.

ARGUMENT

I. SECTIONS 3729(a)(2) AND (a)(3) REQUIRE PROOF THAT A FALSE CLAIM WAS SUBMITTED TO THE GOVERNMENT OR THAT A DEFENDANT PARTICIPATED IN A CONSPIRACY TO SUBMIT SUCH A CLAIM.

FCA liability can be imposed under Sections 3729(a)(2) and (a)(3) only where the plaintiff can establish that a false claim was submitted to the federal government or that the defendant participated in a conspiracy to submit such a claim. The Sixth Circuit's holding that Sections 3729(a)(2) and (a)(3) "cover[ ] false claims made to parties other than the government so long as the claim will be paid with government funds" (Pet. App. 9a) is directly at odds with the plain language, statutory structure, and legislative origins of the FCA.

A. Section 3729(a)(2) Requires The Submission Of A False Claim To The Government For Payment Or Approval.

1. This Court's interpretation of Section 3729(a)(2) can begin and end with the statute's plain language. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). Section 3729(a)(2) imposes FCA liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). Congress's intention in enacting this provision could not have been clearer: The phrase "paid or approved *by the Government*" unambiguously establishes that Congress intended to impose liability where a false claim has been submitted to the federal government for payment or approval. Indeed, for a claim to be "paid or approved by the Government," it first must be submitted to the government.

The submission of a false claim to a private entity that receives funding from the federal government is not equivalent to the submission of a claim to the government itself. If Congress had intended to extend Section 3729(a)(2) to the submission of false claims to federally funded private entities, then it would not have required the claim to be "paid or approved by the Government." *Cf.* 5 U.S.C. § 4101(3) ("'Government' means the Government of the United States"); *id.* § 5911(a)(1) (same). It would instead have provided for the imposition of liability where the claim was "paid with Government funds" or where it was "paid or approved by the Government or by a recipient of Government funds." Indeed, when drafting statutes, Congress frequently references the concept of "Government funds." *See, e.g.*, 3

U.S.C. § 108(a) (referencing "Government funds"); 5 U.S.C. § 5724(a) (same); *id.* § 5725(a); 12 U.S.C. § 244; 41 U.S.C. § 115(a). It would have done so in Section 3729(a)(2) if it intended to extend the FCA to any false claim paid by a private entity with money received from the government.

Congress is well aware of the distinction between the federal government itself and federally funded private entities. *See, e.g.*, 28 U.S.C. § 2671 ("the term 'Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States*") (emphasis added).[2] Indeed, that distinction is reflected in Section 3729(c) of the FCA, which distinguishes between the "Government" and a "contractor, grantee, or other recipient" that is "reimburse[d]" by the "Government" for the payment of a claim. 31 U.S.C. § 3729(c). By selecting the language "paid or approved *by the Government*," Congress therefore restricted the reach of Section 3729(a)(2) to the submission of a false claim to the government itself for payment or approval.[3]

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[2] *See also* 5 U.S.C. § 3371 (distinguishing between a "Federal agency" and a "federally funded research and development center"); 41 U.S.C. § 103 (defining the terms "prime contractor," "subcontractor," and "Government agency"); *Forsham v. Harris*, 445 U.S. 169, 179 (1980) ("The legislative history [of 5 U.S.C. § 552(e)] indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of 'agency.'").

[3] The plain meaning of the term "Government" as referring only to the United States Government—not to federally funded private entities—is confirmed by the legislative history of the

This Court has consistently recognized the legal distinction between the federal government and private entities that receive federal funding. In *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that defendants who allegedly conspired to defraud a private company that received federal financial assistance did not engage in a "conspir[acy] . . . to defraud the United States" within the meaning of 18 U.S.C. § 371 because a private entity that receives federal funding does not constitute the "United States." 483 U.S. at 129.[4] Much as respondents do here, the government had argued in *Tanner* that a "recipient of federal financial assistance and the subject of federal supervision[ ] may itself be treated as 'the United States.'" *Id.* The Court determined that the "interpretation of § 371 proposed by the Government . . . ha[d] not even an arguable basis in the plain language of § 371." *Id.* at 131. The "Government's sweeping interpretation" of the statute, the Court explained, "would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States'"—in direct contravention of the statutory language en-

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1982 amendments to the FCA. *See* H.R. Rep. No. 97-651, at 2-3 (1982) ("Certain standard changes are made uniformly throughout the revised Title 31 . . . . 'United States Government' is substituted for 'United States' (when used in referring to the Government) . . . . Thereafter, in the same section, 'Government' is used . . . .").

4 The statute provides that, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined" and/or imprisoned. 18 U.S.C. § 371.

acted by Congress. *Id.* at 132. The Court concluded that only "[i]f the evidence presented at trial was sufficient to establish that [the defendants] conspired to cause [the private company] to make misrepresentations to the [federal government]" could the conviction stand because only then would the United States itself have been the target of the fraud. *Id.*

This Court's holding in *Tanner* makes clear that a private entity's federally funded status does not transform it into the federal government for fraud purposes. Indeed, this Court has repeatedly emphasized that "[g]rants of federal funds generally do not . . . serve to convert the acts of the recipient from private acts to governmental acts." *Forsham v. Harris*, 445 U.S. 169, 180 (1980). The Court has therefore held, for example, that "written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not 'agency records' within the meaning of the [Freedom of Information] Act," unless "copies of those data have . . . been obtained by"—*i.e.*, submitted to—"a federal agency." *Id.* at 171. This principle holds true even where a private entity receives *all* of its funding from the federal government. *See United States v. Orleans*, 425 U.S. 807, 809 (1976) (holding that a nonprofit corporation that was funded entirely by the federal government was not a "federal instrumentality or agency for purposes of [the] Federal Tort Claims Act").

Lower courts have recognized this distinction between efforts to defraud the federal government itself and fraud directed to private entities that receive federal funding. In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), the D.C. Circuit, in an opinion authored by then-Judge Roberts, held

that Section 3729(a)(2) of the FCA did not apply to the submission of allegedly false claims for payment to Amtrak, a private entity funded by the federal government. *Id.* at 498. The court explained that Section 3729(a)(2) requires proof that a claim was actually submitted to the government and that the relator's claim therefore failed because there was no evidence that Amtrak ever passed the defendants' claims along to a government official. *Id.* at 502. The D.C. Circuit emphasized that "[m]aking false records or statements to get a false claim paid or approved by [a federally funded private company] is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*.'" *Id.* at 498 (quoting 31 U.S.C. § 3729(a)(2)); *see also* Pet. App. 34a (Batchelder, J., dissenting) ("The term 'by the Government' is not the same as 'with government funds.'").

Under the well-established principles recognized by this Court in *Tanner* and applied by the D.C. Circuit in *Totten*, a claim can only be "paid or approved by the Government" within the meaning of Section 3729(a)(2) if the claim was directly submitted to the government for payment or approval or if the claim was submitted to a private entity that thereafter passed it along to the government for that purpose.

The context in which the clause "paid or approved by the Government" is used confirms this reading of the statute. If the phrase "claim paid or approved by the Government" in Section 3729(a)(2) actually meant "claim . . . paid with government funds," as the Sixth Circuit held (Pet. App. 9a), then the words "by the Government" would be utterly superfluous because the term "claim" is already defined by the FCA to include requests for payment where "the United States Government provides any portion

of the money." 31 U.S.C. § 3729(c).[5] If Congress had intended for Section 3729(a)(2) to encompass any false claim paid with federal funds, it would have been unnecessary for it to include the "by the Government" language because that meaning would have been conveyed by the remainder of the statutory language, which—when read in conjunction with Section 3729(c) and without the "by the Government" limitation—reaches anyone who "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved," where "the United States provides any portion of the money" or will reimburse the payment. 31 U.S.C. § 3729(a)(2), *id.* § 3729(c).

It is firmly settled that a court should avoid reading a statute in a manner that renders any portion of its language superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). This canon of statutory construction indicates that a "claim paid or approved by the Government" must be something other than a "claim . . . paid with government funds." The only plausible reading of Section 3729(a)(2) is therefore that the phrase "by the Government" requires sub-

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[5] Section 3729(c) provides:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c).

mission of a claim to the government itself for payment or approval.[6]

2. The requirement that a false claim be submitted to the federal government under Section 3729(a)(2) is reinforced by the FCA's statutory structure and the legislative origins of Section 3729(a)(2).

The Sixth Circuit's conclusion that Section 3729(a)(2) does not require submission of a false claim to the government effectively nullifies the presentment requirement that is indisputably included in Section 3729(a)(1). *See* Pet. App. 23a (acknowledging that Section 3729(a)(1) requires presentment); Opp. to Pet. for Writ of Cert. 25. If Section 3729(a)(2) did not require the submission of a claim to the federal government, then plaintiffs would simply bring suit under Section 3729(a)(2) and assert that the allegedly false claim itself constituted the requisite "false record or statement" in order to evade the presentment requirement in Section

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[6] Interpreting Section 3729(a)(2) to encompass claims submitted to federally funded private entities would also raise difficult constitutional questions. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that "the United States' injury in fact suffices to confer standing" on relators pursuing *qui tam* actions on the government's behalf. *Id.* at 774. In cases where a false claim has never been submitted to the federal government for payment or approval, however, it is doubtful whether the government itself has been injured by a defendant's alleged fraud, and relators may therefore lack Article III standing to pursue an FCA action on the government's behalf. In order to avoid calling into question the constitutionality of the FCA's *qui tam* provisions, this Court should construe Section 3729(a)(2) (and Section 3729(a)(3)) as requiring the submission of a false claim to the government for payment or approval. *See Stevens*, 529 U.S. at 787 (the FCA "should be construed so as to avoid difficult constitutional questions").

3729(a)(1). Under the Sixth Circuit's reading of Section 3729(a)(2), "the plain language requirement in (a)(1) that claims be presented to an officer or employee of the Government would only trip up those foolish enough to rely on (a)(1) rather than (a)(2)." *Totten*, 380 F.3d at 501.

This Court has repeatedly cautioned against reading one section of a statute in a manner that would effectively nullify another section. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992). The requirement that a claim be submitted to the federal government in order to impose liability under Section 3729(a)(2) ensures that the presentment requirement in Section 3729(a)(1) retains viability. Indeed, properly conceived, Sections 3729(a)(1) and (a)(2) serve different, but highly complementary, functions. Section 3729(a)(1) applies to anyone who "presents" a false claim to the government or who "causes" such a claim "to be presented." 31 U.S.C. § 3729(a)(1). The section therefore focuses on the act of submitting a false claim to the government. Section 3729(a)(2), in contrast, applies to anyone who "makes" or "uses," or "causes to be made or used, a false record or statement *to get* a false or fraudulent claim paid." *Id.* § 3729(a)(2) (emphasis added). The section applies not to the act of submitting a false claim itself but to the act of making a false statement in order to obtain payment or approval of a false claim submitted to the government. To establish liability under Section 3729(a)(2), a plaintiff must therefore prove that the defendant made a false statement and that the statement was made to obtain payment or approval of a false claim that has been submitted to the government. Sections 3729(a)(1) and (a)(2) accordingly

serve distinct functions and together reach both persons who submit false claims to the government and persons who make false statements in an effort to get such claims paid.

This interpretation is confirmed by the legislative origins of Section 3729(a)(2). Sections 3729(a)(1) and (a)(2) were originally part of one long sentence that imposed liability upon any person

> who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, . . . knowing such claim to be false, fictitious, or fraudulent; . . . [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of *such* claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry . . . .

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (emphasis added). The predecessor language to Section 3729(a)(2) unambiguously required the submission of a claim to the government because "the reference to 'such claim' was a shorthand reference to the claim already identified in the current subsection (a)(1)—that is, a claim that would be presented or caused to be presented to the United States." *Totten*, 380 F.3d at 500. The term "such" was removed from the statute in 1982 when Congress divided the single, lengthy sentence into the numbered subsections of present-day Section 3729(a). Congress was clear,

however, that the amendment "ma[de] no substantive change in the law." H.R. Rep. No. 97-651, at 3 (1982). Section 3729(a)(2) therefore preserved the presentment requirement that Congress established when it enacted the statute in 1863.

3. Notwithstanding the plain language, statutory structure, and legislative origins of Section 3729(a)(2), the Sixth Circuit held that the provision encompasses "false claims made to parties other than the government so long as the claim will be paid with government funds" and regardless of whether any claim is ever submitted to the federal government for payment or approval. Pet. App. 9a. None of the arguments that the Sixth Circuit offered in support of its countertextual reading of Section 3729(a)(2) is persuasive.

First, the Sixth Circuit argued that the plain language of the FCA supported its holding because "[o]nly subsection (a)(1) of the statute makes any mention of presenting a claim to the government or Armed Forces. Subsection[ ] (a)(2) . . . , which [is a] separate bas[i]s for liability, contain[s] no such presentment language." Pet. App. 7a. The Sixth Circuit's reading of Section 3729(a)(2) is flawed because it is premised exclusively on the fact that the term "present" used in Section 3729(a)(1) is not found in Section 3729(a)(2). That observation does not answer the question whether a plaintiff pursuing a claim under Section 3729(a)(2) must establish that a false claim was submitted to the federal government. The plain language of Section 3729(a)(2)—which requires payment or approval of a false claim "*by the Government*"—establishes that submission of a false claim to the government is required. The Sixth Circuit's holding disregards that unambiguous language, and—like the government's reading of 18

U.S.C. § 371 in *Tanner*—impermissibly "substitute[s] 'anyone receiving federal financial assistance and supervision' for the phrase 'the [Government]'" in Section 3729(a)(2). 483 U.S. at 132.

Congress's use of the phrase "paid or approved by the Government" in Section 3729(a)(2)—rather than the term "present"—to convey this meaning does not undermine this conclusion. Congress's word choice simply reflects the fact that Section 3729(a)(2) prohibits the use of false statements to obtain payment or approval of a false claim that has been submitted to the government, rather than the use of such statements to effectuate the presentment of a false claim to the government in the first instance.[7]

The Sixth Circuit also relied on the definition of "claim" in Section 3729(c) to support its conclusion that submission of a false claim to the government is not required under Section 3729(a)(2). The Sixth Circuit contended that the "focus of this language"—which encompasses "any request or demand . . . for money or property which is made to a contractor . . . if the United States provides any portion of the money"—"is on the money paid out by the govern-

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[7] The Sixth Circuit was therefore mistaken to rely on the canon of construction that "counsel[s] against attributing the same meaning to different language in the same statute" in concluding that Section 3729(a)(2) does not require the submission of a false claim to the government. Pet. App. 10a-11a. Sections 3729(a)(1) and (a)(2) are worded differently because they encompass different conduct. Although both sections ultimately require proof that a false claim was submitted to the government, Section 3729(a)(1) requires proof that the defendant "present[ed]" such a claim, while Section 3729(a)(2) requires proof that the defendant made a false statement in order to obtain payment or approval by the government of a false claim that either the defendant or someone else had submitted.

ment" and that "[t]here is nothing in this language to suggest the claim must be shown to have been presented to the government." Pet. App. 7a-8a. The Sixth Circuit's reliance on Section 3729(c) is misplaced, however, because the court of appeals read the definition of "claim" in Section 3729(c) in isolation from the liability-creating language of Section 3729(a)(2), which imposes liability on anyone who makes a false statement "to get a false or fraudulent claim paid or approved by the Government." Thus, while the Sixth Circuit is correct that nothing in Section 3729(c) itself requires the submission of a claim to the government, the plain language of Section 3729(a)(2) unambiguously requires that a claim be submitted to the government for payment or approval. The definition of "claim" in Section 3729(c) does not alter this element of a cause of action under Section 3729(a)(2). It instead makes clear that a request for payment submitted to and paid by a federally funded private entity is not excluded from the scope of the FCA, if—as required by Section 3729(a)(2)—a claim is thereafter submitted to the government for reimbursement or approval.

Responding to the D.C. Circuit's analysis in *Totten*, the Sixth Circuit further contended that construing Section 3729(a)(2) to impose liability in the absence of the submission of a claim to the government would not nullify Section 3729(a)(1) because "subsection (a)(2) contains its own more burdensome requirement—the claim must have actually been paid." Pet. App. 12a. The Sixth Circuit conceded, however, that "[t]o [its] knowledge, no authority exists either supporting the proposition that a claim must have been paid or approved to establish a violation of subsection (a)(2) or rejecting it." Pet. App. 13a n.5. Indeed, as Judge Batchelder recognized in dissent, the

only authority cited by the panel majority on this point actually supported the "contrary" proposition. *Id.* at 36a (Batchelder, J., dissenting); *see also id.* at 12a-13a (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 & n.5 (1956) (noting that, "[o]n several of the projects involved in [*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)], fraud was discovered by the Government in time for payments to be withheld" but that FCA liability was nevertheless imposed), and *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss")).

Moreover, the plain language of Section 3729(a)(2) authoritatively forecloses the Sixth Circuit's unsubstantiated reading of the statute as requiring that a claim "have actually been paid." Pet. App. 12a. The statute applies to anyone who makes or uses a false record or statement "*to get* a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2) (emphasis added). As explained above, this provision applies to the act of making or using a false record or statement with the objective of getting a false or fraudulent claim paid or approved by the government. Liability does not depend on whether that claim was actually paid or approved by the government, but on whether the defendant made or used the false statement or record in an effort to secure payment or approval of a false claim that had been submitted to the government.

The Sixth Circuit's conclusion that Section 3729(a)(2) does not require the submission of a claim to the government therefore obliterates the distinction between Sections 3729(a)(1) and (a)(2), and ef-

fectively renders Section 3729(a)(1) dead letter. Under the Sixth Circuit's holding, there would be absolutely no reason for a plaintiff to bring suit under Section 3729(a)(1)—which would require proof that the defendant submitted a claim to the government—when the plaintiff could bring a cause of action regarding the same conduct under Section 3729(a)(2) without being required to establish that a claim was ever submitted to the government.

The Sixth Circuit's reliance on the legislative history to the 1986 FCA amendments is similarly unpersuasive. In that year, Congress added the definition of "claim" in Section 3729(c), and explained that the amendment was intended "to enhance the Government's ability to recover losses sustained as a result of fraud." S. Rep. No. 99-345, at 1 (1986). Nothing in the legislative history, however, suggests that Congress intended to extend the FCA's reach to false claims that were never submitted to the government for payment or approval. Indeed, unless the government has paid or approved a fraudulent claim submitted to it, there has been no financial loss to the government. *Cf. McNinch*, 356 U.S. at 599 ("an application for credit insurance does not fairly come within the scope that Congress intended the [FCA] to have" because "[i]n agreeing to insure a home improvement loan the [government] disburses no funds nor does it otherwise suffer immediate financial detriment").

As an initial matter, any suggestion that the 1986 legislative history supports the Sixth Circuit's holding is conclusively rebutted by the fact that the revisions to the FCA considered by the House and Senate Reports did not yet include the "by the Government" language in Section 3729(a)(2), which was added after publication of those reports. H.R. Rep.

No. 99-660, at 1 (1986); S. Rep. No. 99-345, at 39. That language clarifies that a false claim must be paid or approved "by the Government" itself to give rise to liability under Section 3729(a)(2) and precludes any attempt to manufacture support for the Sixth Circuit's holding from the 1986 legislative history.

Moreover, the content of the reports themselves does not support the Sixth Circuit's reading of Section 3729(a)(2). The Senate Report explained, for example, that the "purpose" of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud *against the Government*." S. Rep. No. 99-345, at 1 (emphasis added). The cases cited in the House and Senate Reports suggest that, consistent with this purpose, Congress added the definition of "claim" in Section 3729(c) to ensure that the FCA was not limited to claims that were submitted directly to the government but that it also encompassed claims that were initially submitted to a private company and then passed along to the government for final approval and/or reimbursement. Indeed, the Senate Report explained that "[c]ase law supports federal jurisdiction and a violation of Federal criminal law when false claims are presented to the United States by an intermediary" (S. Rep. No. 99-345, at 21-22 (internal quotation marks omitted)), and approvingly cited this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), as the type of outcome that it intended to codify through the definition of "claim" in Section 3729(c). *See* S. Rep. No. 99-345, at 10. In *Hess*, this Court held that the FCA applied to a scheme in which the defendants submitted inflated claims to local governments that used federal funds to pay the claims and then passed the claims along to

the federal government for final approval. *Id.* at 542-43. The Court explained that FCA liability attached because the claims "were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis." *Id.* at 545.

The 1986 amendments codified the result in *Hess* and in other cases where FCA liability was imposed even though the claim had not been submitted directly to the federal government but had instead been passed along to the government by a federally funded private intermediary. *See* S. Rep. No. 99-345, at 10; *id.* at 21-22 (citing with approval *United States v. Beasley*, 550 F.2d 261, 271 (5th Cir. 1977), *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir. 1975), and *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974), each of which involved the submission of a false claim to the government through a private intermediary). The Senate Report therefore explained that, under the amendments, "a false claim is actionable although the claims or false statements were made to a party other than the Government, *if the payment thereon would ultimately result in a loss to the United States*"—*i.e.*, if the claim was ultimately passed along to the government. S. Rep. No. 99-345, at 10 (emphasis added).[8]

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[8] Congress also intended for the definition of "claim" to overrule the Seventh Circuit's decision in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that the FCA did not apply to fraud upon federal grantees who received a fixed-sum payment from the government (whether or not the fraudulent claim was subsequently passed along to the government for approval). *Id.* at 762. The Senate Report explained that the definition of "claim" "made clear the United States may bring an action whether the grant obligation is open-ended or fixed." S. Rep. No. 99-345, at 15.

Finally, the Sixth Circuit contended that "the FCA is a remedial statute, and should be construed broadly." Pet. App. 15a. That well-worn principle of statutory construction does not give a court license to disregard the plain language of a statute. *See Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 808 (2007) (where statutory "text does not support [a] proposition[,] . . . the statute's remedial purpose cannot compensate for the lack of a statutory basis"). Section 3729(a)(2) requires that a claim be "paid or approved *by the Government*," and none of the reasoning offered by the Sixth Circuit can justify that court's departure from the plain meaning of this language—that a claim must have been submitted to the government itself for payment or approval.

B. Section 3729(a)(3) Requires A Conspiracy To Submit A False Claim To The Government.

For many of the same reasons that Section 3729(a)(2) of the FCA requires the submission of a false claim to the federal government for payment or approval, liability can only be imposed under Section 3729(a)(3) where the defendant has conspired to submit a false claim to the federal government itself.

As an initial matter, Section 3729(a)(3) is a derivative civil conspiracy provision that imposes liability for conspiracies to engage in conduct that would violate the FCA. *Cf. Beck v. Prupis*, 529 U.S. 494, 505-06 (2000) ("consistency with the common law requires that a RICO conspiracy plaintiff allege injury from . . . an act that is independently wrongful under RICO"). The scope of liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2). *See, e.g., United States ex rel. Atkins v. McInteer*, 345 F. Supp.

2d 1302, 1304-05 (N.D. Ala. 2004) ("When *Totten* held that the direct presentation of a claim to a federal employee is required for stating an FCA claim, it follows that an agreement between two or more persons to present a fraudulent claim to [a state agency], a *grantee*, is not an actionable conspiracy under § 3729(a)(3)."), *aff'd*, 470 F.3d 1350 (11th Cir. 2006); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Because [relator's] FCA claims [under Sections 3729(a)(1) and (a)(2)] fail to state a claim, there can be no conspiracy" under Section 3729(a)(3)). Because the submission of a false claim to the government is a prerequisite to the imposition of liability under either Section 3729(a)(1) or (a)(2), liability can only be imposed under Section 3729(a)(3) where the defendant participated in a conspiracy to submit a false claim to the government.

This result is confirmed by the language of Section 3729(a)(3) itself. Section 3729(a)(3) applies to anyone who "conspires to defraud *the Government* by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3) (emphasis added). That language clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself, rather than to a federally funded private entity. As explained above, Congress is well aware of the distinction between the federal government and recipients of federal funding. *See supra* pg. 14. If Congress had intended for Section 3729(a)(3) to encompass fraud against private companies that receive federal funding, it would have provided for the statute to apply to anyone who "conspires to defraud the Government *or a recipient of Government funds*." Congress's decision not to do so is dispositive here.

Indeed, the "conspires to defraud the Government" language in Section 3729(a)(3) is essentially identical to the "conspire[s] . . . to defraud the United States" language at issue in *Tanner*—which this Court held to apply only to conspiracies to defraud the United States, not to conspiracies to defraud a private company that receives federal funds. 483 U.S. at 132. The Sixth Circuit's holding that a conspiracy to submit a false claim to a federal contractor constitutes a "conspir[acy] to defraud the Government," even where that false claim will never be passed along to the government, is directly at odds with *Tanner*'s conclusion that a conspiracy to make a false statement to a federal grantee only amounts to a "conspir[acy] . . . to defraud the United States" where the defendants "conspired to cause [the private company] to make misrepresentations to the [federal government]"—that is, where the defendants conspired to cause the federal grantee to submit the fraudulent statement to the government. *Id.*

The Sixth Circuit did not mention—let alone, attempt to distinguish—*Tanner*, and did not offer any reasoning for its atextual reading of Section 3729(a)(3) beyond that offered in support of its interpretation of Section 3729(a)(2). Reliance on a tenuous reading of legislative history and on inapposite canons of construction, however, cannot displace the plain language of Section 3729(a)(3), which unambiguously restricts the provision to conspiracies to get false claims paid or approved by the federal government itself.

* * *

Here, it is undisputed that respondents failed to produce any evidence at trial that a claim for payment was ever submitted to the federal government

or that petitioners participated in a conspiracy to submit such a claim to the government. *See* Pet. App. 5a n.3 ("Counsel for relators admitted at the hearing on the Rule 50(a) motion, '[W]e haven't shown you [the prime contractor's] invoices to the United States, and we're not going to show you those because they are totally irrelevant under the False Claims Act.'") (second alteration added). In the absence of any evidence that a false claim was submitted either directly to the federal government, or to a higher-tier subcontractor or prime contractor that then passed along a false claim to the government, petitioners cannot be held liable for "knowingly mak[ing] [or] us[ing] . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government" under Section 3729(a)(2). Nor can they be held liable for "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid" under Section 3729(a)(3). Petitioners were therefore entitled to judgment as a matter of law at the conclusion of respondents' case.

II. The Decision Of The Court Of Appeals Dramatically Expands The FCA's Scope Beyond The Limits Established By Congress.

By casting aside the textual limitations restricting the scope of the FCA, the Sixth Circuit extended the statute's onerous liability provisions to a vast range of conduct that Congress never intended the statute to reach. The decision below should be reversed to reestablish the textual bounds that Congress imposed on the FCA.

The FCA is a specialized statute that addresses "fraud practiced on *the Government*." *United States v. McNinch*, 356 U.S. 595, 599 (1958) (emphasis

added). This Court has explained that "the objective of Congress" in enacting the FCA "was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the *government instrumentality* upon which such claims were made." *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (emphasis added); *see also* S. Rep. No. 99-345, at 1. It was not Congress's intention for the FCA to displace state common-law causes of action, which are the traditional means of remedying fraud perpetrated by one private party against another. *See Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 445 (1963) (Brennan, J., concurring) (referring to the "traditional state interest" in providing "protection against fraud and deception").[9]

According to the Sixth Circuit, however, the FCA encompasses any false claim "paid with government funds" (Pet. App. 9a), and therefore applies whenever an allegedly false claim is submitted to any of the tens of thousands of private entities—including state and local governments, educational institutions, and private businesses—that receive some amount of funding from the federal government. *See Orleans*, 425 U.S. at 816 ("Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well."). Indeed, under

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[9] Congress's intention to enact the FCA as a remedy for fraud perpetrated against the federal government itself is evident from the legislative history accompanying the original 1863 statute. *See* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay *from the Government* during the present war .... [W]ith a view to apply a more speedy and vigorous remedy in *cases of this kind* the present bill has been prepared.") (emphases added).

the Sixth Circuit's expansive reading of the FCA, the statute would apply to *any* claim for payment submitted to *any* entity that receives federal funding. The D.C. Circuit recognized the implications of such reasoning in *Totten*, explaining that, if Section 3729(a)(2) does not require proof that a claim was submitted to the government, "the potential reach" of the FCA would be "almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do." 380 F.3d at 496.

This dramatic expansion of the FCA's scope is at odds with the congressional objectives that animate the statute, and will have profound—and congressionally unintended—consequences for thousands of businesses, including every business that performs subcontracting work on federally funded contracts. Under the Sixth Circuit's countertextual reading of Sections 3729(a)(2) and (a)(3), subcontractors are susceptible to the FCA's severe financial penalties—fines of between $5,500 and $11,000 per false claim, plus treble damages—anytime they submit claims for payment to federally funded prime contractors or higher-tier subcontractors. *See* U.S. Government Accountability Office, Information on False Claims Act Litigation 31 (2005), *at* http://www.gao.gov/new.items/d06320r.pdf (indicating that the average recovery in an FCA action is more than $10 million). Thus, if the decision below is affirmed, every construction company hired as a subcontractor on a federal building, every accounting firm hired by a prime contractor to monitor the finances of a federal project, and every engineering firm hired to perform one of the hundreds of subcontracts relating to the construction of a naval vessel will be subject to FCA li-

ability based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government. *Cf. Metric Constructors, Inc. v. United States*, 314 F.3d 578, 581 (Fed. Cir. 2002) ("subcontractors in a government contract are not in privity with the government"). The unambiguous language of the FCA—together with Congress's well-defined intentions when enacting the statute—establish, however, that such alleged fraud is properly addressed through traditional state-law causes of action, not through the specialized mechanisms of the FCA.

This expansion of the FCA creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies. The possibility of abusive litigation is augmented by the fact that the civil penalties and treble-damages awards available in FCA suits impose tremendous settlement pressure upon even those companies that have meritorious defenses. Many companies simply cannot face the risk of going to trial and being assessed potentially bankrupting FCA liability, and are therefore compelled to accept settlements that provide undeserved windfalls to relators and their counsel.

The Sixth Circuit's decision to extend the FCA to any payment made "with government funds" (Pet. App. 9a) will also vastly complicate the task of trying FCA cases because, "[w]hen federal and nonfederal funds have been commingled, it is difficult to prove whether specific . . . dollars from that account are federal or nonfederal." *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983) (per curiam). If the Sixth Circuit's decision is affirmed, discovery and trial in FCA actions will be immeasurably complicated by efforts to trace the origin of funds used by

federal grantees to pay allegedly false claims. Many such suits will likely devolve into a battle between accounting experts attempting to explain to a jury the source of the specific funds used to pay a claim. *Cf. United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159-60 (2d Cir. 1986) (drug proceeds commingled with legitimate funds are potentially traceable through the "first-in, first-out," pro rata "averaging," and "first-in, last-out" methods). Where a federal grantee does not keep the funds it receives from the government segregated from those it receives from other sources, this will be a time-consuming and complex evidentiary inquiry. In this case, for example, there are three levels of subcontractors involved, and—if this case is retried—it will be necessary for respondents to demonstrate that the prime contractors paid Allison Engine with "government funds," that Allison Engine then used those same funds to pay General Tool, and that General Tool then remitted those funds to Southern Ohio Fabricators.

The far-reaching and profoundly disruptive implications of the Sixth Circuit's reading of the FCA confirm what the statute's plain language, structure, and history unambiguously convey: Sections 3729(a)(2) and (a)(3) apply only where a false claim has been submitted to the federal government or where the defendant participated in a conspiracy to submit such a claim.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner Southern Ohio Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING & KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner General Tool Company

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG & ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner General Motors Corporation

December 13, 2007

RESPONDENT'S BRIEF

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70pp No. 07-214

In the
Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS ROGER L. SANDERS AND ROGER L. THACKER

SCOTT A. POWELL
DON MCKENNA
HARE, WYNN, NEWELL & NEWTON
THE MASSEY BUILDING
SUITE 800
2025 THIRD AVENUE, NORTH
BIRMINGHAM, AL 35203
(205) 328-5330

JAMES B. HELMER, JR.
Counsel of Record
PAUL B. MARTINS
ROBERT M. RICE
HELMER, MARTINS, RICE & POPHAM CO., L.P.A.
600 VINE STREET, SUITE 2704
CINCINNATI, OH 45202
(513) 421-2400
jhelmer@fcalawfirm.com

Counsel for Respondents Relators Roger L. Sanders and Roger L. Thacker

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether false claims for federal Government money made by United States Navy subcontractors are actionable under 31 U.S.C. § 3729(a)(2) or § 3729(a)(3) of the False Claims Act, even if the subcontractors' false claims were not presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 15

ARGUMENT 20

I. PETITIONERS CAN BE LIABLE UNDER FCA SECTIONS (a)(2) AND (a)(3) EVEN THOUGH THEIR FALSE CLAIMS FOR FEDERAL MONEY WERE NEVER PRESENTED OR RE-PRESENTED TO THE UNITED STATES. 20

A. The FCA's Plain Language And Structure Show That Section (a)(2) Does Not Contain A "Presentment" Requirement 20

B. The FCA Definition Of "Claim" And Section (a)(2) Will Be Meaningless If "Presentment" Is Added To Section (a)(2) 27

C. Congress Intended The FCA To Reach All False Claims For Federal Money, Including Those That Are Not "Presented" To A Government Employee 32

1. The FCA Textual Origins Show That "Presentment" Has Never Been A Requirement Of Section (a)(2) 34

2. The 1986 FCA Legislative History Confirms That "Presentment" Is Not An Element Of Section (a)(2) 39

3. Petitioners' Reliance On Other Statutes To Restrictively Interpret The FCA Is Misplaced 43

D. An Actionable Conspiracy To Defraud The Government Under Section (a)(3) Does Not Require Proof That False Claims Were "Presented" To The Government 49

II. THE SIXTH CIRCUIT'S DECISION GAVE FULL EFFECT TO THE BROAD SCOPE CONGRESS ESTABLISHED FOR THE FCA. 52

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 25

Bates v. United States,
522 U.S. 23 (1997) 26

Beck v. Prupis,
529 U.S. 494 (2000) 51

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) 53

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 20

Davis v. Michigan Dept. of Treasury,
489 U.S. 803 (1989) 20, 32

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 20

Dixson v. United States,
465 U.S. 482 (1984) 47

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 56

Forsham v. Harris,
445 U.S. 169 (1980) 47

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,
545 U.S. 409 (2005) 20

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 32

Hibbs v. Winn,
542 U.S. 88 (2004) 27, 28, 37, 50

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 23

Lamie v. United States Trustee,
540 U.S. 526 (2004) 24, 32

Leocal v. Ashcroft,
543 U.S. 1 (2004) 21

Metric Constructors, Inc. v. United States,
314 F.3d 578 (Fed. Cir. 2002) 57, 58

Murray & Sorenson, Inc. v. United States,
207 F.2d 119 (1st Cir. 1953) 40

Peterson v. Weinberger,
508 F.2d 45 (5th Cir. 1975) 55

Ratzlaf v. United States,
510 U.S. 135 (1994) 32

Rockwell Int'l Corp. v. United States ex rel. Stone,
127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007) 39

Securities Indus. Ass'n v. Board of Governors,
468 U.S. 137 (1984) 45

Sullivan v. Stroop,
496 U.S. 478 (1990) 33

Tanner v. United States,
483 U.S. 107 (1987) ..... *passim*

United States v. Bornstein,
423 U.S. 303 (1976) ..... *passim*

United States v. Fausto,
484 U.S. 439 (1988) 56

United States v. Foulks,
905 F.2d 928 (6th Cir. 1990) 43

United States v. Katz,
271 U.S. 354 (1926) 32

United States v. Lagerbusch,
361 F.2d 449 (3rd Cir. 1966) 40

United States v. Largo,
775 F.2d 1099 (10th Cir. 1985) 43

United States v. Long,
996 F.2d 731 (5th Cir. 1993) 43

United States v. Murphy,
937 F.2d 1032 (6th Cir. 1991) 13

United States v. Naftalin,
441 U.S. 768 (1979) 24

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 1, 31, 43, 53

United States v. Orleans,
425 U.S. 807 (1976) 47, 48

United States v. Scott,
784 F.2d 787 (7th Cir. 1986) 43

United States v. Watkins,
2002 U.S. Dist. LEXIS 10029 (N.D. Ill. 2002) .. 57

United States ex rel. Atkins v. McInteer,
345 F. Supp. 2d 1302 (N.D. Ala. 2004) 49, 51

United States ex rel. Conner v.
Salina Reg'l Health Ctr., Inc.,
459 F. Supp. 2d 1081 (D. Kan. 2006) 49, 51

United States ex rel. Davis v. Long's Drugs,
411 F. Supp. 1144 (S.D. Cal. 1976) 33, 55

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 26, 33, 43, 58

United States ex rel. Salzman v. Salant & Salant,
41 F. Supp. 196 (S.D.N.Y. 1938) 18, 42

United States ex rel. Totten v. Bombardier Corp.,
380 F.3d 488 (D.C. Cir. 2004) ..... *passim*

Vermont Agency of Natural Resources v.
United States ex rel. Stevens,
529 U.S. 765 (2000) 56

Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997) 25

STATUTES

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 .... *passim*

Public Law 97-258, 96 Stat. 978 (1982) 38

Public Law 99-562, 100 Stat. 3159 (1986) 38

5 U.S.C. § 552(a)(4)(B) 47

18 U.S.C. § 371 ..... 45, 46

18 U.S.C. § 1962 51

28 U.S.C. § 1346(b) 47

31 U.S.C. § 3729. ..... 10, 37

31 U.S.C. § 3729(a)(1) ..... *passim*

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) ..... *passim*

31 U.S.C. § 3729(b) 11

31 U.S.C. § 3729(c) ..... *passim*

31 U.S.C. § 3801 56

31 U.S.C. § 3801(a)(3)(B) 56

31 U.S.C. § 3802(a)(1) 56, 57

31 U.S.C. § 3803(c)(1) 56, 57

OTHER AUTHORITIES

H.R. Rep. No. 97-651 (1982) 38

H.R. Rep. No. 99-660 (1986) 41, 47

S. Rep. No. 99-345 (1986) ..... *passim*

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Respondents Roger L. Sanders and Roger L. Thacker respectfully request this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

A. The False Claims Act ("FCA") is broadly written "to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Consistent with this purpose, Congress defines actionable false or fraudulent "claims" to include not only claims for federal money "presented" to an employee of the United States, but also claims for federal money submitted to a "contractor, grantee or other recipient" that distributes the federal funds. 31 U.S.C. § 3729(c). This case involves nothing more than a straightforward application of that statutory text.

In light of the FCA's broad definition of "claim," the Sixth Circuit held that Petitioners' false claims submitted to federal Government contractors for federal Government money could support FCA liability under the plain language of Sections 3729(a)(2) and 3729(a)(3). Pet. App. 23a-25a.[1] The Sixth Circuit disagreed with Petitioners' assertion that actionable false claims under Sections 3729(a)(2) and 3729(a)(3)

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[1] Citations to the Petition for Certiorari Appendix are "Pet. App." Citations to Petitioners' Merits Brief are "Pet. Br." Citations to the parties' Joint Appendix in this Court are "JA." Citations to the parties' joint appendix in the Sixth Circuit are "CA App."

had to be "presented" to a Government employee, since a "presentment" requirement is not part of the plain text of these sections—nor was there any apparent reason to add such a term, particularly with a definition of "claim" that plainly reaches false claims for federal money that are not "presented" to the Government. Pet. App. 23a-25a. This conclusion is compelled by the text, structure and purpose of the FCA and should be affirmed.

Petitioners contend that the Sixth Circuit's opinion effects a near-boundless extension of the FCA to reach "*any* claim submitted to a recipient of federal funds[.]" Pet. Br. 3 (emphasis in original). This is incorrect. The Sixth Circuit's opinion and the FCA itself reach only *false or fraudulent* claims for *federal* money. A non-false, non-fraudulent claim for non-federal money has never been actionable under the FCA, even if submitted to an entity that otherwise receives some federal funding, and the Sixth Circuit did not hold differently.

Petitioners' more prevalent theme, though, is their contention that the FCA should not apply because, with Petitioners' false claims for federal money never reaching an employee of the United States, this case only involved "private" fraud among "private" parties. Pet. Br. 3. It is a paper fiction to suggest, as Petitioners do, that fraud against the federal public fisc cannot occur unless a Government employee personally receives a false claim for federal funds. The FCA's clarifying definition of "claim," in fact, codifies the exact opposite. By finding that Petitioners' false invoices for federal money could support FCA liability even though they were not presented to a Government

employee, the Sixth Circuit simply gave full effect to the FCA's broad definition of "claim." Petitioners' disagreement is thus not really with the Sixth Circuit's opinion, but is instead with Congress's chosen method for effectively combating fraud.

B. The facts of this case are undisputed for purposes of this appeal, and they show a decidedly clear fraud against the United States. In 1985, the United States Navy began procuring its new fleet of *Arleigh Burke* class guided missile destroyers from two prime-contractor shipbuilders, Bath Iron Works and Ingalls Shipbuilding, at a cost to the federal Government of approximately one billion taxpayer dollars per ship. Pet. App. 2a-3a. The Navy required every part of its destroyers to be manufactured in strict compliance with a variety of military requirements set forth in the prime contract, and those Navy requirements had to be followed whether the shipyards accomplished the work themselves or hired subcontractors to assist. CA App. 337-346. Accordingly, the shipyards ensured that the Navy's requirements were flowed down to and thus imposed on Petitioners. Pet. App. 3a.

Petitioners are all subcontractors to the Navy's prime-contractor shipbuilders, and were responsible for various aspects of constructing the generator sets ("Gen-Sets") that provide all electrical power needed for each destroyer. Pet. App. 3a-4a. Starting in the late 1980s, the shipyards contracted with Petitioner Allison Engine Company, Inc. (a division of Petitioner General Motors Corporation through 1993) to provide the Navy's Gen-Sets. *Id.* In turn, General Motors/Allison contracted with Petitioner General Tool

Company to assemble the Gen-Sets with the General Motors/Allison jet engine as the power source, and General Tool Company contracted with Petitioner Southern Ohio Fabricators, Inc. ("SOFCO") to build the steel Gen-Set bases and enclosures. *Id.* Over 150 Gen-Sets would eventually be assembled at General Tool Company's facility in Cincinnati, sent to the shipyards for installation, and ultimately delivered to the Navy as part of over 50 completed destroyers. JA 40a-41a.

The Navy's contracts with the shipyards required that all parts of the destroyers, including the Gen-Sets, be made in accord with Navy-approved baseline drawings and Navy military standards, with deviation permitted only "with approval of the Government." CA App. 423. These Navy requirements were incorporated into the subcontracts for all Petitioners, from the shipyard contracts with General Motors/Allison (CA App. 565-575, 599-617), to the General Motors/Allison contracts with General Tool Company (CA App. 855-873), to the General Tool Company contracts with SOFCO (CA App. 714-721). Thus, there was an uninterrupted flow of Navy contract specifications that each of the Petitioners knew they were required to follow in building the Gen-Sets.

In addition, with each delivered Gen-Set, General Motors/Allison provided a written Certificate of Conformance that the unit was manufactured in accord with all of the Navy's baseline configuration and military requirements. CA App. 514-518, 954-963. SOFCO signed hundreds of Certificates of Conformance attesting that all of its work complied with the Navy's requirements. CA App. 995-1050.

The Navy's oversight of Petitioners' work extended beyond the contract terms requiring compliance with military requirements. In each of the Petitioners' subcontracts, the Navy explicitly reserved the right, notwithstanding the lack of direct contractual relations, to inspect Petitioners' work at any point during Gen-Set construction. CA App. 607, 720, 864. The Navy also enjoyed, again despite lack of contract privity, an array of options under the General Motors/Allison contracts with the shipyards to address Gen-Set defects: The Navy could reject a defective Gen-Set; the Navy could equitably reduce the price of a defective Gen-Set that the Navy determined to accept anyway; or, in the end, the Navy could terminate General Motors/Allison's contract for default. CA App. 607-608. In short, the Navy's procurement of its Gen-Sets and the involvement of the subcontractor Petitioners were not "private" matters among "private" parties involving "private" contract requirements.

C. In exchange for their agreements to build the Gen-Sets as the Navy specified, Petitioners received hundreds of millions of dollars of taxpayer funds. CA App. 837-847, 914-953, 966-994. It is undisputed that all money paid to Petitioners for their Gen-Set work came from the United States Treasury. As the General Motors/Allison Gen-Set Program Manager succinctly testified:

> Q. . . . the money as it would flow would come from the Navy or the Treasury Department, taxpayer money, to Bath. That would be sort of the first step. Is that right?

A. Well, you left out, it flows from the taxpayers to the Congress to the Department of Navy to Bath, then us, to –

Q. But, eventually, it's our money, isn't it?

A. Yours and mine.

Q. Right. So it comes from the Navy or the Treasury Department to Bath?

A. Yes.

Q. And then, depending on what milestone or level of production is reached, Bath would then -- let's take just in the gen set project itself. Bath would pay Allison?

A. Bath pays Allison.

Q. And then, again, Bath is paying Allison with what originally was our money. Right?

A. Yes.

Q. Allison would pay General Tool?

A. Allison would pay General Tool.

Q. Again, with what was originally our money?

A. Yes.

Q. General Tool would pay SOFCO?

A. Yes.

Q. Again, originally with what was our money?

A. Yes.

JA 110a-111a. Thus, there is no question that the payment of federal funds to the prime-contractor shipyards included the amounts that the shipyards used to pay the subcontractor-Petitioners for their Gen-Set work.

The process for disbursing the federal funds to the shipyards and to Petitioners is detailed in the various contracts. The Navy's prime contract with the shipyards established a milestone payment schedule by which the shipyards had to submit regular invoices in order to draw Navy funds, and each of those invoices had to certify both the progress achieved in ship construction as well as the costs that had been incurred by the shipyards. CA App. 410-414. It was established at trial that the shipyards did submit their milestone invoices to the Navy, since Petitioners stipulated that the Navy paid the shipyards an aggregate total of one billion federal dollars for each new destroyer. CA App. 317. While the Navy did not require the prime contractors to submit with their invoices all the claims for payment from the myriad subcontractors working on the destroyer project, the Navy did reserve the right to inspect and audit all documentation upon which the shipyards' invoices

were based, which would include Petitioners' invoices. CA App. 415.

Petitioners repeatedly assert that there was no evidence at trial that any claims for payment were ever submitted to the Government at all. Pet. Br. 5, 6. 9, 11, 31. This is incorrect. While the shipyard *invoices* were not given to the Jury, the foregoing evidence (all admitted at trial) sufficiently shows that claims were made to the Navy. In fact, the district court presumed that "the Jury could infer that Bath submitted invoices to the Government because the ships were continuing to be built." Pet. App. 58a. While Petitioners' invoices were not "presented" to the Navy, there certainly was evidence that the *shipyards* "presented" claims to the Navy. The district court simply found no evidence that those presented claims were "false." *Id.* at 58a-59a.

But the false claims at issue in this case were Petitioners' invoices falsely seeking payment of federal money. These were all admitted into evidence. General Motors/Allison were paid approximately three million dollars per Gen-Set from the taxpayer money the shipyards received from the Navy and, as with the shipyards, Allison claimed this money by regular invoices reflecting progress milestones reached in making the Gen-Sets. CA App. 638-654, 914-953. General Tool Company was paid approximately $800,000 per Gen-Set of the taxpayer money that General Motors/Allison received from the shipyards, also pursuant to a milestone payment schedule. CA App. 655-713, 966-994. And SOFCO was paid over $100,000 per Gen-Set of the taxpayer money that General Tool Company received based upon SOFCO's

progress in making Gen-Set bases and enclosures. CA App. 837-847.

Both the flow of federal money from the Government to Petitioners, as well as the flow of Navy requirements that Petitioners knew they had to follow in order to claim those federal dollars, were painstakingly established at trial. This was not a "private" matter involving only "private" parties. It is undisputed that Petitioners knew they were working on a Navy contract funded by federal dollars. The Navy's funds used to pay the Petitioner subcontractors for the Navy's Gen-Sets did not become "private" funds because they were distributed by the prime contractor shipyards. Indeed, the only reason that the shipyards' milestone invoices to the Navy—which were based on progress achieved and costs incurred—could have ever sought any money for the Gen-Sets is because Petitioners themselves sought payment for their Gen-Set work from the shipyards. The public funds used to buy the Navy's Gen-Sets were never "private" funds belonging to the shipyards.

D. Respondents Roger L. Sanders and Roger L. Thacker are former employees of Petitioner General Tool Company, and they brought suit in 1995 as *qui tam* Relators against Petitioners under these FCA provisions:

§ 3729 False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

JA 94a-96a.[2]

At trial, Respondents produced sufficient evidence for the Jury to find that Petitioners regularly violated the Navy's requirements for Gen-Set construction, concealed those violations, and thus falsely claimed payment of hundreds of millions of taxpayer dollars. Pet. App. 24a-25a. The Navy-approved drawing requirements and quality standards required Petitioners, among other things, to ensure that Gen-Set welders were qualified to military standards; that Gen-Set gearboxes were free of oil leaks (which is a decided fire hazard on a combat vessel) and other defects; and that completed Gen-Sets underwent a comprehensive quality Final Inspection so that defects could be identified and corrected before the Gen-Sets were sent for installation into the destroyers CA App. 526, 629-630, 1051.

Over the course of the five-week trial, Respondents introduced evidence that Petitioners knowingly violated these Navy requirements: (1) Unqualified SOFCO welders worked on all of the first 67 Gen-Sets; (2) General Motors/Allison and General Tool Company installed defective and oil-leaking Gen-Set gearboxes in the first 52 units; and (3) General Tool Company

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[2] The FCA defines "knowingly" as follows: "For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information — (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. §3729(b). It is presumed on appeal that Petitioners acted with sufficient FCA "knowledge." Pet. App. 25a.

failed to conduct a quality Final Inspection for almost half of the first 67 Gen-Sets. Pet. App. 4a, 24a-25a. Though these Gen-Sets did not conform to Navy requirements, Petitioners nonetheless made claims for payment and were paid with 100% Navy funds. *Id.*

Applying these facts to the FCA's text, the "claims" at issue were Petitioners' false invoices seeking payment of Navy funds; those invoices were "false or fraudulent" claims because Petitioners sought the Navy's funds despite violating the Navy's contract requirements; the "false records or statements" were the General Motors/Allison and SOFCO Certificates of Conformance falsely declaring that the Navy's Gen-Sets had been made to Navy standards; and the "conspiracy" involved the work by General Motors/Allison and General Tool Company to install and conceal defective Gen-Set gearboxes. JA 64a-66a.

This appeal does not challenge or concern the sufficiency of this evidence, so the accepted factual predicate, as it was for both lower court decisions, is this: Petitioners knew at all times that they were being paid with Navy funds, that Gen-Set quality was controlled by Navy standards, and that the Gen-Sets were mission-critical hardware for the Navy's new destroyers. Petitioners knowingly made false claims for federal funds, knowingly made false records to get false claims for federal funds paid, and conspired to defraud by getting false claims for federal funds paid. Pet. App. 24a-25a. Put simply, the Navy did not get the quality destroyers that it ordered and paid for because dozens of Gen-Sets manufactured by Petitioners violated the Navy's standards.

E. Discovery and trial focused on the Petitioners' actions, not those of the prime-contractor shipyards, because Petitioners (not the shipyards) made the defective Gen-Sets. This approach is precisely consistent with this Court's determination that FCA actions must concentrate on the conduct of the wrongdoer: "A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *United States v. Bornstein*, 423 U.S. 303, 313 (1976). *See also* James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* § 3-16 (Top Gun Publishing, 5th ed. 2007). FCA liability for subcontractor conspiracies is similarly well-settled. *E.g. United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991).

Here, the district court presumed the sufficiency of the evidence that Petitioners had knowingly made false claims for Navy funds, knowingly made false records or statements to get false claims for Navy funds paid, and conspired to get false claims for Navy money paid. Pet. App. 39a-41a, 58a-60a. But the district court found this behavior insufficient to support FCA liability. After the close of Respondents' evidence, the district court directed a verdict for Petitioners by finding, based on the majority opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), that only false claims "presented" to a Government employee could support liability under FCA Sections (a)(1), (a)(2) or (a)(3). Pet. App. 56a.

In dismissing the case, the district court considered two sets of potentially-actionable claims. First, while there was enough evidence that Petitioners' invoices were false, the district court found no evidence that those false claims for payment were "presented" to the Navy. *Id.* at 59a. Second, while there was enough evidence that the prime-contractor shipyards had "presented" claims for payment to the Navy, the district court found no evidence that those claims for payment were "false" because "there is no evidence that Bath had a continuing duty to comply with any 'regulations' let alone certify its compliance with any 'regulations.'" *Id.* at 58a.

The district court did not reconcile its focus on the "false" conduct of the shipyards with *Bornstein*'s requirement that the focus must be on the "false" conduct of the Petitioner subcontractors. *Bornstein*, 423 U.S. at 313. *Bornstein* even found that the number of claims submitted by a prime contractor to the Government was "wholly irrelevant" in determining the number of FCA civil penalties owed by the culpable subcontractor, deciding instead that penalties are appropriately based on the subcontractor's own false claims. *Id.* at 312. Indeed, in *Bornstein* the prime contractor's invoices were primarily relevant as proof that they "included" amounts used to pay the subcontractor's false claims—proof, in other words, that the subcontractor's false claims were paid with federal Government money. *Id.* at 307-308. Respondents in this case offered proof of the same linear connection between Petitioners and the Government fisc, yet this did not satisfy the district court. Pet. App. 58a-59a.

The Sixth Circuit reversed. While agreeing that "presentment" of false claims to a Government employee is a required element of FCA Section (a)(1), the majority opinion found that "presentment" is clearly not in the plain text of Sections (a)(2) or (a)(3). Pet. App. 7a. In light of the FCA's definition of "claim" that includes false claims for federal Government money that are not "presented" to an employee of the United States, the majority below found no basis to add a "presentment" requirement to Sections (a)(2) and (a)(3). Pet. App. at 6a-8a, *quoting* 31 U.S.C. §3729(c). The majority then demonstrated how its decision was fully supported by the legislative history to the 1986 FCA amendments, as well as this Court's repeated refusals to interpret the FCA in a restrictive manner. *Id.* at 8a, 15a-16a.

The dissenting opinion would have affirmed the district court based upon the *Totten* majority opinion. Pet. App. 35a-37a. Notably, in so deciding the dissent did not address or attempt to reconcile its opinion with the FCA's definition of "claim," the 1986 FCA legislative history, or this Court's broad construction of the FCA. As the majority found, these sources demand the same outcome: "Thus, the FCA covers all claims to government money, even if the claimant does not have a direct connection to the government." Pet. App. 15a.

SUMMARY OF ARGUMENT

I. Congress wrote the FCA broadly to reach all fraudulent efforts to obtain taxpayer funds. Since these efforts include fraudulent claims for taxpayer money that are never "presented" to a federal

Government employee, Congress clarified with the FCA's definition of "claim" that those false claims can support liability, provided they falsely seek federal Government money. 31 U.S.C. § 3729(c). FCA Sections (a)(2) and (a)(3) do not condition liability on "presentment" of false claims to the Government, and the Sixth Circuit correctly refused to add such a requirement.

A.1. There is no implied requirement in Section (a)(2) that actionable false claims must be "presented" to a federal Government employee, as Petitioners contend. "Presenting" a false claim for federal money to a federal employee is prohibited by Section (a)(1), not Section (a)(2). Congress knew how to condition FCA liability on "presentment," but did not do so in Section (a)(2).

2. Section (a)(2) liability is for making false statements "to get a false claim paid or approved by the Government." The Government can certainly pay false claims without direct involvement of its own employees, so payment "by the Government" does not require "presentment" of false claims to the Government, as Petitioners presume. Congress clarified this exact point with the definition of "claim."

B.1. Implying a "presentment" requirement in Section (a)(2) would render the definition of "claim"—which defines actionable claims to include those *not* presented to the Government—superfluous. Petitioners mistakenly argue that Congress added the definition of "claim" merely to clarify that false claims submitted to private entities can support FCA liability if they are thereafter presented to the Government.

But this basis for liability is already actionable under Section (a)(1), which prohibits *causing* presentation of false claims. Likewise, adding "presentment" to Section (a)(2) would render the entire section meaningless. The making of false records to get false claims "presented and paid or approved" would thereby *cause* presentation of the false claim, which is actionable under Section (a)(1).

2. The phrase "by the Government" in Section (a)(2) does not add, *sub silentio*, a "presentment" requirement. Instead, "by the Government" clarifies that false claims actionable under Section (a)(2) must seek federal Government money. This clarification is needed because the FCA's definition of "claim" does not limit actionable claims to those seeking federal Government money. Petitioners also incorrectly say that if "presentment" is not an element of Section (a)(2), then Section (a)(1) would have no meaning—anyone lacking evidence of "presentment" would simply bring suit under Section (a)(2). This improperly rewrites the definition of "claims" to mean only "records or statements." But Congress defined claims to be *any* request or demand for Government money or property. "Claims" are not synonymous with "records or statements."

C. The FCA's origins and legislative history also show that "presentment" is not always required for FCA liability. Congress reiterated in 1986 that, for example, a false claim to a Government grantee, or to a State under a program financed in part by the United States, is a false claim to the United States without need for any further "re-presentment" of the

false claim to the Government. S. Rep. No. 99-345 at 10 (1986).

1. As originally enacted in 1863, "presentment" of a false claim was but one type of prohibited conduct, along with "making" false claims and "making" (or "using") false records or statements to obtain payment of false claims. In each instance, the false claims supporting liability must have been for federal Government funds or property. The false claims did not also have to be "presented" to the Government. When Congress added the current definition of "claim" in 1986, Congress clarified the broad reach of the FCA to include false claims that are not "presented" to a Government employee. Congress did not nullify that definition by silently intending the phrase "by the Government" to mean "presentment."

2. Congress meant the new definition of "claim" to overrule judicial opinions that had restricted the reach of the FCA. One of those opinions involved dismissal of a case where false claims for federal money were submitted to the Red Cross but not re-presented to a Government employee. *United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196, 197 (S.D.N.Y. 1938). A blanket FCA "presentment" requirement would improperly revive *Salzman* and its restrictive interpretation of the FCA contrary to Congressional intent. S. Rep. No. 99-345 at 21 (1986).

3. The FCA is a broadly-worded statute with a clearly intended expansive scope. This Court has consistently construed the FCA in liberal fashion. Petitioners essentially ignore this and argue for a narrow construction because some other statutes are

worded and thus construed restrictively. *See, e.g., Tanner v. United States*, 483 U.S. 107 (1987). This is improper. Congress has different goals for other statutes, but meant to reach broadly with the FCA.

D. As with the plain text of Section (a)(2), FCA Section (a)(3) contains no requirement that a false claim for federal money must be "presented" to a federal Government employee. Liability is for conspiring to defraud the Government, and "presenting" false invoices to the Government is not the only method of defrauding the Government. Section (a)(3) liability is not, as Petitioners' contend, "derivative" of liability under Sections (a)(1) or (a)(2). It is written to reach much different conduct, and adding a "presentment" requirement would render it meaningless. It would then be merely an example of conduct that violates Section (a)(1).

II. Adhering to the plain text of Sections (a)(2) and (a)(3) as well as the definition of "claim," the Sixth Circuit held that Petitioners' false claims for Navy funds were actionable because they were *false* claims for *federal Government* funds. Petitioners' assertions that this case involved "private" claims for "private" funds are untrue.

If "presentment" is added to Sections (a)(2) and (a)(3), the Government's ability to use the FCA to combat fraud would be profoundly restricted in ways that Congress never intended. Most notably, false claims submitted to Medicare and Medicaid would no longer be actionable under the FCA because those claims are not presented to the Government. This would end decades of successful FCA prosecutions

whereby billions of fraudulently obtained Medicare and Medicaid funds have been returned to the Treasury.

The Sixth Circuit applied the FCA to reach clear fraud committed by Petitioners against the Navy. That Petitioners' invoices were not re-presented to the Navy does not alter the character of their fraudulent conduct. Congress intended the FCA to reach this behavior, so the Sixth Circuit's decision should be affirmed.

ARGUMENT

I. PETITIONERS CAN BE LIABLE UNDER FCA SECTIONS (a)(2) AND (a)(3) EVEN THOUGH THEIR FALSE CLAIMS FOR FEDERAL MONEY WERE NEVER PRESENTED OR RE-PRESENTED TO THE UNITED STATES.

A. The FCA's Plain Language And Structure Show That Section (a)(2) Does Not Contain A "Presentment" Requirement.

1. Proper interpretation and construction of the FCA begins with its plain language. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), *citing Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The inquiry then continues with consideration of the words "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Isolated treatment of FCA sections—which Petitioners advocate—is improper because "[s]tatutory language has meaning only in context[.]" *Graham County Soil*

& Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 415 (2005), *citing Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Both the plain language and context of the FCA confirm that "presentment" is not a requirement of Section (a)(2).

It is undisputed that the text of Section (a)(2) does not mention "presentment." This is because the act of "presenting" a false or fraudulent claim to a Government employee is already prohibited by Section (a)(1). Instead, Section (a)(2) reaches entirely different behavior: Knowingly *making or using a false record or statement* in order "to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). On its face, then, Section (a)(2) is not concerned with the "presentation" of anything to a Government employee, so long as the other elements of liability are satisfied.

All elements are met in this case: (a) Petitioners made and used hundreds of false records and statements, namely the General Motors/Allison and SOFCO Certificates of Conformance falsely certifying that the Gen-Sets were made as required by the Navy (CA App. 514-518, 954-963, 995-1050); (b) Petitioners acted with sufficient FCA "knowledge" that those Certificates of Conformance were false (Pet. App. 24a); and (c) Petitioners made false claims (their false milestone invoices) that were indisputably paid by the federal Government with federal Government funds—as the testimony of the General Motors/Allison Program Manager confirmed, all payments for the Gen-Sets came from Navy funds. JA 110a-111a. Nothing further is required to demonstrate Petitioners' liability under Section (a)(2).

Two other FCA provisions reinforce the conclusion that "presentment" is not part of Section (a)(2). First, Section (a)(1) explicitly does prohibit the knowing "presentment" of a false claim "to an officer or employee of the United States Government or a member of the Armed Forces of the United States[.]" 31 U.S.C. § 3729(a)(1). If Congress wanted Section (a)(2) to reach only false records or statements that are made in connection with "presentment" of a false claim to a Government employee, Congress could easily have done so by using the "presentment" language from Section (a)(1). Congress did not do so and intentionally omitted such language from Section (a)(2).

Second, Congress clarified by the definition of "claim" that FCA liability does not necessarily depend upon "presentment" of false claims to a Government employee. 31 U.S.C. § 3729(c). This is why the FCA defines actionable false claims to include those that are *not presented* to a Government employee, upon proof that such false claims are for federal Government money or property. *Id.* ("'claim' includes any request or demand . . . made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded[.]") Petitioners' false claims clearly fall within this definition, and Petitioners do not argue otherwise.

The FCA definition of "claim" unambiguously articulates a decided Congressional policy: False claims for federal Government money are actionable even if a federal Government employee does not personally receive the false claim or personally

distribute the falsely claimed federal money. 31 U.S.C. § 3729(c). Thus, to responsibly protect the federal public fisc against fraud, the FCA is not stymied by the particular *entity* that receives a false claim for federal funds, or that distributes the falsely-claimed federal funds. Protecting the *federal funds* from fraudulent claims is the goal, whether those funds are administered and distributed by the federal Government or by a "contractor, grantee or other recipient" charged with those tasks. *Id.*

2. Though neither the term nor the concept of "presentment" is part of Section (a)(2), Petitioners say that Congress "unambiguously" intended the phrase "paid or approved by the Government" in Section (a)(2) to require proof that false claims are "presented" to a Government employee also. Pet. Br. 13. According to Petitioners, "for a claim to be 'paid or approved by the Government,' it first must be submitted to the government." Pet. Br. 13. This is a conclusion, not a reasoned explication of Congressional intent based on the words of the FCA, and merely captures the outcome sought by Petitioners.

But the Government does not actually have to pay or approve anything for Section (a)(2) to be violated. Instead, as its plain text states, this section prohibits knowingly making or using false records or statements. Payment or approval of a false claim is not the trigger for liability, but merely defines the purpose for which the false records or statements are made or used. Thus, if payment or approval of a false claim does not have to occur, then there is no reason that the false claim need be "presented" to the Government at all.

Petitioners ignore the most instructive evidence of Congressional intent—the words of the statute: "The starting point in discerning congressional intent is the existing statutory text[.]" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004), *citing Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Congress wrote Section (a)(2) without including a "presentment" requirement. Congress wrote a definition of actionable "claims" to include those not submitted to the Government. It is presumed that Congress acted deliberately in its drafting. *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.")

This presumption of Congressional deliberation is appropriate here. Congress made "presenting" a false claim to a Government employee one of several distinct bases for liability, not a definition of the kinds of false claims that are actionable under other FCA sections. The FCA already has such a definition of actionable "claims," and it does not have a general "presentment" requirement. 31 U.S.C. § 3729(c).[3]

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[3] Petitioners argue that if Congress meant for Section (a)(2) liability to extend beyond claims that are "presented" to a Government employee, then Congress would have "provided for the imposition of liability where the claim was 'paid with Government funds[.]'" Pet. Br. 13. Again, actual payment is not required for FCA liability to attach. It is simply not the conduct of the defrauded party at which the liability provisions of this statute are directed. And Congress did clarify by the definition of "claim" that actionable claims include those that seek federal Government "money or property"—provided those claims are *false*. 31 U.S.C. § 3729(c). Petitioners are reading Section (a)(2) in

Unsupported by the FCA text, Petitioners' conclusion that "paid or approved by the Government" can only mean that a claim "first must be submitted to the Government" is a *non sequiter*. This conclusion depends, in the first instance, on giving the same meaning to different words. As the Sixth Circuit correctly found, this Court has "consistently counseled against attributing the same meaning to different language in the same statute." Pet. App. 10a-11a, *citing Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Petitioners' solitary construction of "by the Government" also ignores other plain interpretations of that phrase that do *not* require adding anything to it or the FCA. For instance, as noted by the *Totten* dissent: "The statutory language requires no such result. In common parlance, the fact that expenses are 'paid by' an entity does not mean that the entity paid them directly. When a student says that his college living expenses are 'paid by' his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses." *Totten*, 380 F.3d at 506, *citing Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary,

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isolation rather than considering the FCA as a whole and all of its provisions in context.

words in a statute are assumed to bear their ordinary, contemporary, common meaning.")

The federal Government pays for the goods and services it procures, or entitlements it provides, without always having its own employees receive the invoices or write the checks—a fact this Court long-ago recognized in rejecting rigid constructions of the FCA that render its protection of federal taxpayer funds "dependent upon the bookkeeping devices used for their distribution." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943).

Moreover, reading the phrase "paid or approved by the Government" as synonymous with "presented to the Government and paid or approved by the Government" adds an element of liability to Section (a)(2). This runs counter to this Court's admonition against "reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Congress certainly knew how to make "presentment" a requirement for liability, having done so for Section (a)(1), but Congress did not use such language for Section (a)(2).[4]

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[4] Adding "presentment" to Section (a)(2) is also inconsistent with Petitioners' agreement with the Sixth Circuit's dissent that a false claim for federal money does not have to be paid in order to trigger liability. Pet. Br. 24-25, *citing* Pet. App. 36a (Batchelder, J., dissenting). Since Section (a)(2) concerns, in Petitioners' words, making a false record or statement "with the objective of getting" a false claim paid (Pet. Br. 25), then Section (a)(2) is fully violated by one who has the necessary "objective" at the time of making the

B. The FCA Definition Of "Claim" And Section (a)(2) Will Be Meaningless If "Presentment" Is Added To Section (a)(2).

1. Petitioners' suggested addition of a "presentment" requirement to Section (a)(2) suffers from an even more fundamental flaw: It would render both the definition of "claim" and Section (a)(2) itself meaningless. Petitioners recognize that this Court "should avoid reading a statute in a manner that renders any portion of the language superfluous." Pet. Br. 18, *citing Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Petitioners twice violate this canon.

Petitioners argue that actionable "claims" always "must be submitted to the Government." Pet. Br. 13. The FCA definition of actionable "claims" includes those that are not presented to the Government. 31 U.S.C. § 3729(c). These are irreconcilable statements that Petitioners do not address. If false claims must always be presented to a Government employee, then the FCA's definition of "claim" has no meaning.

Petitioners attempt to save the definition of "claim" by asserting that it merely clarifies that "a request for payment submitted to and paid by a federally funded private entity is not excluded from the scope of the FCA, if—as required by Section 3729(a)(2)—a claim is thereafter submitted to the government for reimbursement or approval." Pet. Br. 24. But in this scenario, when the false claim is "thereafter

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false record or statement, whether the false claim is ever "presented" to or paid by anyone.

submitted" to a Government employee, the person who originally made the false claim has (eventually) *caused* that false claim to be presented to a Government employee. This conduct is already actionable under Section (a)(1) without need for the definition of "claim." 31 U.S.C. 3729(a)(1) (liability for one who "presents, or causes to be presented, to an officer or employee of the United States Government . . ."). Thus, if there is a blanket requirement that false claims for federal money must be "presented" to a Government employee to support FCA liability, then the definition of "claim" is nullified.

Likewise, a "presentment" requirement in Section (a)(2) would render that statutory provision meaningless. If a person knowingly makes a false record or statement in order to get a false claim for federal money "presented" to the Government and paid, the false record or statement will be one of the *causes* for the "presentment" of the false claim. This conduct is already actionable under Section (a)(1) without need for Section (a)(2). With a "presentment" requirement in Section (a)(2), this section thus becomes no more than an *example* of conduct that violates Section (a)(1)—a false claim is presented because a false record is made—rather than a separate liability-creating provision.

Rendering the definition of "claim" and Section (a)(2) meaningless by adding a "presentment" requirement to Section (a)(2) is not sound statutory construction. *Hibbs*, 542 U.S. at 101.

2. Petitioners eventually contend that their reading of "by the Government" as including a

"presentment" requirement is more than an interpretive conclusion; they say it is mandatory in order to give that phrase any meaning at all. Pet. Br. 17-18. Their argument is this: (i) Section (a)(2) prohibits making false records or statements "to get a false claim paid or approved by the Government"; (ii) the phrase "by the Government" cannot merely require that the false claims are paid with federal Government funds because, according to Petitioners, the requirement that actionable false claims must be paid with Government funds is already part of the FCA's definition of "claim"; (iii) thus, there must be another meaning for "by the Government"; and (iv) the "only plausible reading of Section (a)(2) is therefore that the phrase 'by the Government' requires submission of a claim to the government itself for payment or approval." Pet. Br. 18-19.

This logic fails. The phrase "by the Government" serves the very purpose that Petitioners say it need not serve: It clarifies that actionable false claims under Section (a)(2) must be false claims that seek federal Government money or property. Petitioners say that this would be duplicative because the FCA definition of "claim" already limits actionable false "claims" to those that seek federal Government money or property, but Petitioners have misread the definition of "claim."

The FCA's definition of "claim" is not an exclusive list of actionable false claims. It is, instead, a non-exhaustive list of the types of claims that may be actionable under the FCA, and this list "includes" false claims that are paid with federal Government money—but the definition does not, of itself, exclude

any claims from the reach of the FCA. 31 U.S.C. § 3729(c). Thus, without the qualifying phrase "by the Government," Section (a)(2) would reach those who make false records or statements "to get a false or fraudulent claim paid or approved"—by anyone, without necessary regard for whether federal Government money was sought by the false or fraudulent claims. With the phrase "by the Government," Section (a)(2) reaches only false claims made for federal Government funds, which is the intended scope of the FCA.

The phrase "by the Government" in Section (a)(2) is needed for the very reason that the definition of "claim" is not the limiting factor that Petitioners suggest. The phrase does not have to contain a "presentment" requirement to give it natural meaning and purpose.

Petitioners next argue that Section (a)(1) would be rendered meaningless unless "presentment" is required in Section (a)(2). Pet. Br. 19. They say that plaintiffs who cannot proceed under Section (a)(1)—because they are unable to prove "presentment" of false claims to a Government employee—would always be able to avoid the problem by merely re-labeling the un-"presented" false claims as "false records or statements" and bring the allegations under Section (a)(2). Pet. Br. 19-20. This improperly re-defines actionable false "claims" as limited to false "records or statement."

The FCA definition of "claim" includes (but is not limited to) "*any* request or demand" for federal Government money or property, not merely those in

the form of a false "record or statement." 31 U.S.C. § 3729(c) (emphasis added). Had Congress meant to restrict actionable false "claims" to false "records or statements," Congress would have defined false "claims" as "any *records or statements* that request or demand" federal Government money or property. While false "records or statements" can certainly be types of actionable claims, Congress plainly did not restrict the FCA so that false "records or statements" are the *only* types of actionable claims. The FCA text makes clear that "claims" are not synonymous with "records or statements," and there is no reason to so limit the reach of the FCA.

Moreover, Sections (a)(1) and (a)(2) are complementary since they reach distinctly different behavior—the former is violated every time a false claim for federal money is "presented" to a federal Government employee, and the latter violated every time a false record or statement is made to get a false claim for federal money paid. Thus, even if there is some overlap between Sections (a)(1) and (a)(2), giving effect to both provisions would be entirely consistent with Congress's intent and this Court's recognition that the FCA should be construed to "reach all types of fraud[.]" *Neifert-White Co.*, 390 U.S. at 232. Adding a "presentment" requirement to Section (a)(2) achieves the opposite, since it restricts the FCA by reading Section (a)(2) out of the Act.

The objective in construing the FCA must be to give it "a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative

purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926). Petitioners' argument that "presentment" is an element of Section (a)(2) is not based on a literal application of the FCA, and even if it were, it is not a sensible construction because it leads to the absurd consequence of negating two other provisions of the FCA. The Sixth Circuit, on the other hand, sensibly construed the FCA so that all sections are given effect, and its decision is explicitly consistent with the broad purpose Congress intended.

C. Congress Intended The FCA To Reach All False Claims For Federal Money, Including Those That Are Not "Presented" To A Government Employee.

Since the plain language of the FCA's definition of "claim" unambiguously reaches false claims for federal money that are not "presented" to a federal Government employee, and since the plain language of Section (a)(2) does not make "presentment" an element of liability, this Court need look no further to affirm the Sixth Circuit. *Lamie*, 540 U.S. at 534, *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.") *See also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (no need to "resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.")

Though Petitioners recognize this canon, Pet. Br. 13 (*citing Sullivan v. Stroop*, 496 U.S. 478, 482 (1990)), they yet delve at length into both the origins and legislative history of the FCA to support an implied addition of "presentment" to Section (a)(2). Pet. Br. 21-22, 26-28. This is tacit acknowledgment, certainly, that the FCA's plain language does not "unambiguously" contain a presentment requirement in Section (a)(2). And, contrary to Petitioners' assertions, the FCA's origins and legislative history demonstrate that Congress did not limit the FCA's reach to false claims presented to the Government.

Petitioners say that "[n]othing in the legislative history, however, suggests that Congress intended to extend the FCA's reach to false claims that were never submitted to the government for payment or approval." Pet. Br. 26. Actually, Congress was not really "extending" the FCA, so much as clarifying the broad reach that Congress always meant and that courts (including this Court) had generally recognized: "For example, a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States, *is a false claim to the United States*. S. Rep. No. 99-345 at 10 (1986) (emphasis added), *citing United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1144 (S.D. Cal. 1976). Congress did not say, as Petitioners would have it, that false claims for federal money submitted to grantees or States are false claims to the United States "only if they are re-presented to the United

States." Congress said the opposite—re-presentment is not required.[5]

1. The FCA Textual Origins Show That "Presentment" Has Never Been A Requirement Of Section (a)(2).

Before reaching the 1986 legislative history, Petitioners argue that the text of previous versions of the FCA "unambiguously" required presentation of false claims to the federal Government, and that this requirement somehow survived the 1986 amendments. Pet. Br. 21-22. Both assertions are contradicted by the plain text of the FCA.

The original FCA language from 1863 did not separately number the bases for liability that are now Sections (a)(1) and (a)(2), which were instead part of the same sentence:

> . . . who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer

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[5] The context of this Congressional statement is instructive. It is the final sentence in a paragraph identifying the broad range of actionable false claims, which begins by stating that false claims for federal money do certainly include those presented to a federal Government employee. S. Rep. No. 99-345 at 10 (1986). By then stating that false claims for federal money included those *not* presented to a Government employee (*id.*), Congress obviously understood the distinction—and intended *both* to be actionable.

> thereof, knowing such claim to be false, fictitious, or fraudulent; . . . [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry . . . .

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97.

These words do not, as Petitioners contend, "unambiguously" always require "presentment" of a false claim to a Government employee for FCA liability. Pet. Br. 21. Quite the opposite. "Presentation" of a false claim to the Government is but one of several bases for liability in the original FCA, just as in the current version. Other behavior supporting liability under the 1863 version included "making" a false, fictitious, or fraudulent claim; "making" a false record or statement to obtain payment of a false, fictitious, or fraudulent claim; and "using" a false record or statement for the purpose of obtaining payment of a false fictitious, or fraudulent claim. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. In each instance, the false "claims" supporting liability must have sought federal Government money or property because those false claims had to be made "upon or against the Government of the United States." *Id.* There was no textual qualification that actionable "claims" could only be those "presented" to a Government employee. *Id.*

Notwithstanding the silence in the plain text, Petitioners contend that there was an implied requirement in the 1863 version of the FCA that making or using false records to get payment of false claims—the behavior that is now prohibited by current Section (a)(2)—did not support FCA liability unless the false claims were also "presented" to the Government. Pet. Br. 21, *citing Totten*, 380 F.3d at 500. This is so, according to Petitioners, because the 1863 version of the FCA reached the making or using of false records only if they were "for the purpose of obtaining, or aiding in obtaining, the approval or payment of *such claim*"—and Petitioners say the phrase "such claim" referred "unambiguously" back in the statutory text to claims "presented" to the Government. *Id.*

This is a flawed reading of the 1863 FCA. The phrase "such claim" did not refer only to claims "presented" to the Government. The phrase "such claim" appeared earlier in the statutory text as a reference both to false claims "made" upon or against the Government as well as to false claims upon or against the Government that were "presented" to a Government employee. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. Thus, "such claim" unmistakably referred to all claims "upon or against the Government"—not just the subset that were also "presented" to the Government.

Indeed, if prohibited false "claims" in the 1863 text were only those "presented" to the federal Government, then the acts of "making" a false claim, "making" a false record or statement, or "using" a false record or statement to obtain payment of a false claim for federal money would have been rendered

meaningless. "Making" false claims, "making" false records or "using" false records would have merely been *examples* of how to *cause* the "presentment" of a false claim to the federal Government—and "causing" presentation of a false claim was already prohibited. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. But Congress did not write the 1863 statute so that "presentment" was the only actionable conduct. Congress included "making" false claims, and "making" (or "using") false records or statements to obtain payment of false claims, as separate bases for liability that each must be given meaning. *See Hibbs*, 542 U.S. at 101.

The 1863 version of the FCA has been re-codified multiple times, and in 1982 the liability provisions were divided into separate sections:

> **§ 3729. False claims**
>
> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;

Public Law 97-258, 96 Stat. 978 (1982). Congress apparently meant its 1982 re-codification to be cosmetic only. H.R. Rep. No. 97-651 at 3 (1982). Congress thus explicitly kept intact its distinction that "presenting" a false claim to the Government is but one type of prohibited behavior, not a requirement for liability under all FCA sections.

When Congress amended the FCA in 1986, it added the current definition of "claim" as well as the phrase "by the Government" to the end of Section (a)(2). Public Law 99-562, 100 Stat. 3159 (1986). As noted above, the simultaneous addition of these provisions at once clarified Congress's century-old intended broad reach of the FCA, and also ensured that Section (a)(2) could not thereafter be construed to reach beyond false claims for federal Government money. For Petitioners, the addition of the phrase "by the Government" in 1986 "establishes" that presentment is required in Section (a)(2). Pet. Br. 13. Yet Petitioners also contend that "presentment" has been part of the FCA since 1863. Pet. Br. 22. This, of course, begs the question: If "presentment" has always been a requirement of Section (a)(2), Congress would not have needed to "establish" that element of liability by adding the phrase "by the Government" in 1986. Congress inserted "by the Government" for another reason—and that was to clarify, in light of the additional broad definition of "claim," that Section

(a)(2) was limited to only false claims for federal Government money or property.

2. The 1986 FCA Legislative History Confirms That "Presentment" Is Not An Element Of Section (a)(2).

Turning to the 1986 FCA legislative history, Petitioners selectively cite the Senate Report to inaccurately ascribe to Congress a narrow construction of the FCA that includes a blanket "presentment" requirement. Pet. Br. 27-28.[6] Congress meant the definition of "claim," according to Petitioners, "to ensure that the FCA was not limited to claims that were submitted directly to the government but that it also encompassed claims that were initially submitted to a private company and then passed along to the

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[6] Before trying to use the 1986 legislative history for their benefit, Petitioners contend that none of it is instructive because the phrase "by the Government" was not added to Section (a)(2) until after the Senate and House reports were published. Pet. Br. 26. "But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *Bornstein*, 423 U.S. at 310. In light of Congress's repeatedly stated goal in 1986 that it meant to clarify a broad reach for the FCA, it is not reasonable to suppose that Congress silently and simultaneously reversed course and added the phrase "by the Government" to eviscerate the definition of "claim" and restrict the FCA to reach only false claims made to a Government employee. *See Rockwell Int'l Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397, 1408, 167 L. Ed. 2d 190, 206 (2007) (absent a clear statutory limitation, the Court will not infer one.)

government for final approval and/or reimbursement." Pet. Br. 27. But there was no need for Congress to add the definition of "claim" to ensure this reach because false claims "passed along to the Government" have been actionable since 1863 because the false claimant has *caused* the presentation of the false claim to the Government. 31 U.S.C. § 3729(a)(1).

The 1986 legislative history is replete with statements articulating Congress's true motivation in adding the definition of "claim," which was to clarify that a false claim for federal money, even if not made to the federal Government, "is a false claim to the United States." S. Rep. No. 99-345 at 10 (1986). The Senate broadly stated that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345 at 10 (1986), *citing United States v. Lagerbusch*, 361 F.2d 449 (3rd Cir. 1966) *and Murray & Sorenson, Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953).[7] Using almost the same broad

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[7] In *Lagerbusch*, the Third Circuit rejected the argument "that the False Claims Act is inapplicable because the appellant's false representations were made to and the consequent undeserved payments of money were made by Hercules Powder Co., a private corporation which employed him." *Lagerbusch*, 361 F.2d at 449. The protections of the FCA were triggered, the court found, because "the United States paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the appellant." *Id.* This is precisely the situation here. Petitioners' false representations and false claims for

language, the House said that "claims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986).

Since these statements of Congressional intent are irreconcilable with a "presentment" requirement, Petitioners assign different meaning to Congress's plain words—just as Petitioners do with the FCA's plain text. Thus, when Congress said that false claims to non-Government parties are actionable if they "ultimately result in loss to the United States," Petitioners presume that "loss to the Government" only happens "if the claim was ultimately passed along to the government." Pet. Br. 28, *quoting* S. Rep. No. 99-345, at 10 (1986). But this is not what Congress said. Nor did Congress need to clarify that claims "passed along" to the Government are actionable, since Section (a)(1) prohibits "causing" presentment of false claims.

In adding the definition of "claim" in 1986, Congress meant to clarify the broad reach of the FCA and thus overrule judicial opinions that had "limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." S. Rep. No. 99-345 at 22 (1986). Petitioners are therefore mistaken in asserting that the definition of "claim" merely

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federal money were made to private corporations, yet it is undisputed that the Navy paid for all the sums fraudulently obtained by Petitioners.

"codified" results in cases that broadly construed the FCA, cases which had already *augmented* the ability of the Government to use the FCA to combat fraud effectively. Pet. Br. 27-28. While Congress certainly did agree with the judicial decisions broadly interpreting the FCA, "codifying" this agreement would not have been necessary had there been no decisions restricting the Government's ability to use the FCA to combat fraud. But there were such decisions.

One of the cases Congress meant to overrule concerned precisely the situation involved here: False claims for federal funds were not presented directly to a Government employee, so the trial court found that the FCA was not implicated. S. Rep. No. 99-345 at 22 (1986), *citing United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938). In *Salzman*, the district court dismissed an FCA action involving false claims submitted to the Red Cross—and not re-presented to a Government employee—reasoning that even though the Red Cross received federal grant money, it was not the "government" for FCA purposes. *Salzman*, 41 F. Supp. at 197. Congress intended the definition of "claim" to overrule *Salzman*. S. Rep. No. 99-345 at 22 (1986).

A restrictive construction of the FCA that adds a "presentment" requirement to Section (a)(2) would improperly revive *Salzman* contrary to Congressional intent. It would also mark a departure from this Court's unfailingly broad construction of the FCA: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive

reading, even at the time when the statute imposed criminal sanctions as well as civil." *Neifert-White*, 390 U.S. at 232.

3. Petitioners' Reliance On Other Statutes To Restrictively Interpret The FCA Is Misplaced.

While Petitioners acknowledge that the FCA is designed to reach all fraud against the Government (Pet. Br. 27), they attach great significance to the direct involvement of a Government employee in the process—implying that fraud against the Government does not occur unless the fraudulent claim is seen by a Government employee. But this Court has always understood that "Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. . . . These funds are as much in need of protection from fraudulent claims as any other federal money[.]" *Marcus*, 317 U.S. at 544.[8]

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[8] Indeed, one can be guilty of embezzling "money or things of value of the United States" (18 U.S.C. § 641) even though the federal funds are "administered by a nonfederal agency." *United States v. Largo*, 775 F.2d 1099, 1102 n.3 (10th Cir. 1985). *See also, e.g., United States v. Long*, 996 F.2d 731 (5th Cir. 1993) (university funds received from a state agency, but originating in the federal treasury, retained their federal character for purposes of § 641); *United States v. Foulks*, 905 F.2d 928 (6th Cir. 1990) (federal grant funds in the possession of the Toledo Salvation Army still considered federal funds); *United States v. Scott*, 784 F.2d 787, 790-91 (7th Cir. 1986) (§ 641 applied to theft of funds from a local government agency that was primarily funded by the federal government).

Though Petitioners hint at a rule that fraud against the Government cannot occur without the involvement of a Government employee, they never do squarely advocate that extreme. This means, importantly, that Petitioners do not argue that Congress lacks the *authority* to protect federal funds that are falsely claimed from non-Government entities where no federal Government employee ever sees the false claim. Petitioners assert, instead, the much different notion that Congress did not mean to do so with the FCA. Pet. Br. 14. With the text and legislative history of the FCA demonstrating the opposite, Petitioners look beyond the FCA to support their conception of Congressional intent.

Citing several statutes that reference "Government funds" or distinguish between the federal Government and a federal Government "contractor, grantee, or other recipient" of federal funds—including the FCA itself—Petitioners first note that Congress well-knows the difference between the federal Government and a non-federal Government entity. Pet. Br. 13-14 (citations omitted). From this, Petitioners conclude that Congress must have intended FCA Section (a)(2)'s reference to false claims paid "by the Government" to mean false claims paid *personally* by a federal Government employee after *personally* receiving the false claim. *Id.* The FCA's definition of "claim" provides the exact opposite. Indeed, in that definition Congress identified the difference between the federal Government and its contractors specifically to overcome that distinction in order to reach all false claims for federal money, including those that are not submitted to the federal Government. 31 U.S.C. § 3729(c).

This broad FCA purpose should not be given effect, say Petitioners, because Congress enacted other statutes with different goals that were achieved in a narrower fashion. Pet. Br. 15-16. It is inappropriate, under recognized canons of statutory interpretation, to rigidly apply the mandates or structure of one Congressional statute to another where Congress's stated policies and goals are not the same, notwithstanding similar language. *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 174-175 (198)'Connor, J., dissenting). Such is the case with the statutes cited by Petitioners.

The first is the federal criminal conspiracy statute, 18 U.S.C. § 371. In *Tanner v. United States*, 483 U.S. 107 (1987), the defendants conspired to defraud a private company of funds that were borrowed from a federally-financed bank and secured by a federal credit agency. *Tanner*, 483 U.S. at 110. The Government prosecuted the defendants under 18 U.S.C. § 371, which prohibits two or more people from conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose[.]" The Government argued for a broad construction of § 371 so that conspiratorial conduct aimed at recipients of federally-financed loans would be treated as against "the United States" for purposes of § 371. *Tanner*, 483 U.S. at 131.

This Court rejected the Government's suggested reading of § 371 for two main reasons. First, "the interpretation of § 371 proposed by the Government in this case has not even arguable basis in the plain language of § 371." *Tanner*, 483 U.S. at 131. Second, the Government's interpretation "has wrested no aid from § 371's stingy legislative history." *Tanner*, 483

U.S. at 131. Since Congress had not indicated its agreement with the Government's construction of § 371, either in the plain text or legislative history, this Court refused to adopt such a broad interpretation of a criminal statute. *Tanner*, 483 U.S. at 132.

Petitioners claim that this Court's narrow construction of the federal criminal conspiracy statue mandates a similar narrow construction of the civil FCA because "*Tanner* makes clear that a private entity's federally funded status does not transform it into the federal government for fraud purposes." Pet. Br. 16. The issue here is not whether a private entity is "transformed" into the federal Government. The issue is whether Congress meant to protect federal funds distributed by private entities where the false claim for those federal funds is never presented to a Government employee. *Tanner* did not hold that fraud against the federal Government fisc could occur only by direct contact with a Government employee. *Tanner* merely held that Congress did not intend a broad reach for the criminal conspiracy statute. *Tanner*, 483 U.S. at 132.

The exact evidence of Congressional intent missing in *Tanner* is present regarding the civil FCA. Most notable is the definition of "claim," where Congress expressed its intent that fraud against federal money can occur even if the false claims are not presented directly to a federal Government employee. 31 U.S.C. § 3729(c).[9] In addition, the legislative history to the

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[9] This Court narrowly interpreted *Tanner* because it involved a criminal statute, and any doubts about the reach of a criminal

FCA amendments unequivocally confirms that Congress meant the FCA to reach *all* false claims for federal money. S. Rep. No. 99-345 at 10 (1986); H.R. Rep. No. 99-660 at 21 (1986). *Tanner* does not support a restrictive interpretation of the FCA.[10]

The same is true regarding the two other statutes cited by Petitioners. In *Forsham v. Harris*, 445 U.S. 169 (1980), this Court refused to extend the reach of the Freedom of Information Act (5 U.S.C. § 552(a)(4)(B)) to include documents in the possession of federal grantees because Congress clearly did not intend that result: "Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so[.]" *Forsham*, 445 U.S. at 180. And in *United States v. Orleans*, 425 U.S. 807 (1976), this Court found that Congress intended the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671 *et seq.*) to apply only to

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statute are construed in favor of narrow construction: "'If the legislative history fail[ed] to clarify the statutory language,' the Court observed, 'our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.'" *Tanner*, 483 U.S. at 131, *quoting Dixson v. United States*, 465 U.S. 482, 491 (1984) (additional citation omitted).

[10] Petitioners fault the Sixth Circuit for failing to address, "let alone, attempt to distinguish" the *Tanner* decision. Pet. Br. 31. This is because Petitioners themselves did not address or argue to the Sixth Circuit that *Tanner* had any applicability to this case. Likewise, *Tanner* is not mentioned in either the *Totten* majority opinion or dissent. In truth, *Tanner* does not support the narrow interpretation of the FCA advanced by Petitioners.

federal Government employees and agencies, not federally-funded local community action councils. *Orleans*, 425 U.S. at 813-817. Unlike those other statutes, Congress clearly expressed its intent that the FCA reach Petitioners' false claims for federal money despite the lack of "presentment" to a federal Government employee. 31 U.S.C. § 3729(c).

In sum, it is of no real moment that Congress has different goals in mind for its varied statutes, and sets to achieve those goals with appropriate language. Congress does not always intend to reach broadly, of course, but it meant to do so with the FCA by reaching all fraudulent efforts to injure the federal public fisc, even when a federal Government employee is not involved.[11]

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[11] Petitioners suggest in a footnote a possible constitutional challenge to the FCA, arguing that without "presentment" added to Section (a)(2), "it is doubtful whether the government itself has been injured by a defendant's alleged fraud, and relators may therefore lack Article III standing to pursue an FCA action on the Government's behalf." Pet. Br. 19 n.6. When the Government pays for quality hardware and receives defective hardware instead, the Government is injured. This truism is at the heart of *Bornstein*, where this Court recognized that a subcontractor's manufacture of defective radio parts, which were incorporated into radios sold to the Government by the prime contractor, injured the Government even though the subcontractor's invoices were not submitted to the Government. 423 U.S. at 313. *Bornstein* also answers the concern (expressed by the majority in *Totten*, 380 F.3d at 496) that without "presentment," there might be potential "quadruple" liability for subcontractors—treble damages under the FCA in addition to single damages in a suit brought by the prime contractor. This would not occur because whatever possible action the prime contractor might have against

D. An Actionable Conspiracy To Defraud The Government Under Section (a)(3) Does Not Require Proof That False Claims Were "Presented" To The Government.

The plain text of FCA Section (a)(3) contains no requirement that a false claim for federal money must be "presented" to a federal Government employee. 31 U.S.C. § 3729(a)(3). Instead, it imposes liability upon anyone who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" *Id.* Here, the Sixth Circuit found sufficient evidence that General Motors/Allison and General Tool Company conspired to defraud the federal Government by getting false claims for federal money paid in connection with their installation of defective gearboxes in the Navy's Gen-Sets. Pet. App. 24a-25a.

Petitioners read a "presentment" requirement into Section (a)(3) in two ways. First, they argue that liability under Section (a)(3) is "derivative" of liability under Sections (a)(1) and (a)(2), so "liability under Section 3729(a)(3) is therefore defined by the scope of liability under Sections 3729(a)(1) and (a)(2)." Pet. Br. 29, *citing United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1304-05 (N.D. Ala. 2004), *aff'd on other grounds*, 470 F.3d 1350 (11th Cir. 2006); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006). But by subordinating Section (a)(3), Petitioners have read

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the subcontractor, the prime contractor could not logically collect and keep amounts for damages sustained by the *Government*. *Bornstein*, 423 at 314 and n.9.

that provision out of the FCA. As with Section (a)(2), a "presentment" requirement in Section (a)(3) would transform that provision into merely an *example* of how to violate Section (a)(1)—if a conspiracy to defraud the Government must include "presentment" of a false claim for federal money to a Government employee, the conspirators have *caused* presentment of a false claim. Such conduct is already actionable under Section (a)(1). This is another improper effort to vitiate provisions of the FCA. *Hibbs*, 542 U.S. at 101.

There is no reason to render Section (a)(3) a meaningless "derivative." Its plain text reaches distinct misbehavior. Liability under Section (a)(3) does not require presentment (as is required under Section (a)(1)) and does not require the making or using of false records or statements to effectuate the fraudulent scheme (as is required under Section (a)(2)). Instead, Section (a)(3) requires concerted action between two or more persons "to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" 31 U.S.C. § 3729(a)(3). Again, though there may be some overlap among the behavior prohibited by Sections (a)(1), (a)(2) and (a)(3), the Sixth Circuit gave each statutory provision independent meaning to assist in the Congressional goal of reaching all types of fraud perpetrated on the federal Government. Pet. App. 7a-8a, 12a-14a. Petitioners would have this Court construe the FCA restrictively so that Sections (a)(2) and (a)(3) reach no fraudulent conduct beyond that already encompassed by Section (a)(1).

The two district court FCA cases cited by Petitioners as support for their assertion that Section

(a)(3) is a "derivative" form of liability contain no statutory analysis. One decision assumed, without discussion, that the analysis in *Totten* supporting a "presentment" requirement in Section (a)(2) applies also to Section (a)(3)—even though *Totten* did not concern Section (a)(3) allegations at all and, more importantly, *Totten's* Section (a)(2) analysis was based on the phrase "by the Government," which does not appear in Section (a)(3). *Atkins*, 345 F. Supp. 2d at 1304-05, *citing Totten*. The other decision cited by Petitioners merely cites *Atkins* and the district court's decision in this case without further analysis. *Conner*, 459 F. Supp. 2d at 1091, *citing Atkins and Sanders*. Thus, *Atkins* and *Conner* are not independent support for Petitioners' construction of Section (a)(3).[12]

Beyond their assertion that Section (a)(3) is a "derivative action," Petitioners contend that the section's language "clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself[.]" Pet. Br. 30. But the "conspiracy" prohibited by Section (a)(3), as its plain text states, is to "defraud

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[12] Petitioners also cite this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000), which held that a RICO conspiracy has to include proof that another RICO provision is violated. *Id.* at 505-506. This holding does not support Petitioners' claim that an FCA Section (a)(3) conspiracy has to include proof of a Section (a)(1) or (a)(2) violation because the RICO conspiracy provision—unlike the FCA conspiracy provision—is defined as a conspiracy to violate another RICO provision. 18 U.S.C. § 1962 (d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.") FCA Section (a)(3) is not defined as a conspiracy to violate Sections (a)(1) or (a)(2).

the Government," not to "submit a false claim to the Government." 31 U.S.C. § 3729(a)(3). And Congress clarified with the definition of "claim" that defrauding the Government can occur even if the false claims for federal money are not submitted to a federal Government employee. This does not mean, as Petitioners argue, that Section (a)(3) applies to "fraud against private companies that receive federal funding[.]" Pet. Br. 30. Section (a)(3) applies to fraud against the federal Government, and whether the false claims for federal money are made to a federal Government employee or to a private company that distributes the federal money, the result is the same: The federal Government has been defrauded of taxpayer dollars.

Section (a)(3) unambiguously does not include a "presentment" requirement. No sound basis exists for adding such a term, particularly because doing so would render this independent statutory provision meaningless.

II. THE SIXTH CIRCUIT'S DECISION GAVE FULL EFFECT TO THE BROAD SCOPE CONGRESS ESTABLISHED FOR THE FCA.

By adding the definition of "claim" in 1986, Congress plainly reaffirmed its long-standing intent that the FCA broadly reach all fraudulent efforts to obtain federal taxpayer funds, including false claims for federal money that are never submitted to a federal Government employee. 31 U.S.C. § 3729(c). As this Court recently noted, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the

Government.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003), *quoting Neifert-White Co.*, 390 U.S. at 232. Restrictively construing the FCA, as Petitioners advocate, is thus at odds with the FCA's plain text, Congressional intent and this Court's precedent.

In finding that Petitioners' false claims for federal money could support FCA liability under Sections (a)(2) and (a)(3), the Sixth Circuit followed the plain text of those Sections—neither of which include a "presentment" requirement—as well as the definition of "claim," which confirms that "presentment" is not a prerequisite for liability. Pet. App. 7a-8a. Turning to the facts of this case, the Sixth Circuit found Petitioners' invoices could support FCA liability because they were claims for *federal Government* money, and those claims were false because Petitioners had violated the *federal Government* conditions regarding distribution of the federal Government funds. Pet. App. 24a-25a.

Petitioners are thus incorrect to describe this case as involving "fraud perpetrated by one private party against another." Pet. Br. 33. Petitioners did not make claims for "private" funds, did not violate "private" contract specifications regarding construction of the Navy's Gen-Sets, and thus did not perpetrate fraud against "private" prime contractor shipyards. Rather, the Navy ordered Gen-Sets of an exacting quality, retained oversight and inspection authority covering all the work done by Petitioners—including rights to terminate the Gen-Set contracts for default—and paid Petitioners completely with Navy funds. *See supra* pp. 3-12. By violating the Navy's

quality requirements, Petitioners undoubtedly injured the Navy even though they were not in direct privity with the Navy. *Bornstein*, 423 U.S. at 313. It is therefore misguided for Petitioners to contend that this is a "private" matter to be resolved under "state-law" remedies for "private" fraud. Pet. Br. 33.

By ignoring the facts of this case—and thus the foundation for the Sixth Circuit's decision—Petitioners also incorrectly assert that the Sixth Circuit's decision is a "dramatic expansion" of the FCA so that it "would apply to *any* claim for payment submitted to *any* entity that receives federal funding." Pet. Br. 34 (emphasis in original). The Sixth Circuit applied the FCA to reach claims for *federal* funds made by Petitioners despite violating *federal* contract specifications. This is a straight application of the FCA's text, which does not concern "any" claim, but instead reaches false claims for federal Government funds. 31 U.S.C. § 3729(a)(1); 31 U.S.C. § 3729(a)(2); 31 U.S.C. § 3729(a)(3); 31 U.S.C. § 3729(c). Petitioners argue that a "presentment" requirement should be presumed throughout the FCA to ensure that the FCA reaches only fraud against the federal Government, but in reality the FCA is already so focused by its requirement that actionable claims falsely seek federal money.

A blanket "presentment" requirement would, on the other hand, eliminate the definition of "claim" and dramatically restrict the FCA. Most notably, false claims submitted to Medicare and Medicaid would no longer be actionable under the FCA because those claims are not presented to a federal Government

employee, which is the opposite result that Congress intended:

> Under the Medicare program, claims are not submitted directly to the Federal agency, but rather to private intermediaries—usually insurance companies—which are subsequently reimbursed by the United States. However, false Medicare claims have been uniformly held to be within the ambit of the False Claims Act, though the claims were actually filed with, and paid by insurance companies. . . . Although the Federal involvement in the Medicaid program is less direct, claims submitted to State agencies under this program have also been held to be claims to the United States under the False Claims Act.

S. Rep. No. 99-345 at 21 (1986), *citing Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975); *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976).

Prosecution of Medicare and Medicaid fraud under the FCA has continued uninterrupted since 1986, returning billions of fraudulently obtained taxpayer dollars to the federal public fisc. *See* http://www.taf.org/STATS-FY-2007.pdf. If "presentment" of false claims is always required, then Medicare and Medicaid claims would be outside the reach of the FCA, and the Government's ability to use the FCA to redress fraud would be limited—contrary to the plain language of the FCA and Congressional intent. S. Rep. No. 99-345 at 22 (1986).

Furthermore, a restrictive "presentment" requirement would inappropriately disjoin the remedies available to the Government under the FCA and the companion Program Fraud Civil Remedies Act ("PFCRA"). 31 U.S.C. § 3801, *et seq.* As this Court recognized not long ago, the PFCRA is "a sister scheme creating administrative remedies for false claims" that Congress "designed to operate in tandem with the FCA." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 and n.17 (2000). Finding the reach of the PFCRA "virtually identical" to the FCA, this Court held that comparing the two statutory schemes is appropriate because "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." *Id.* at 786 n.17, *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Though the scope is the same, the PFCRA is structured somewhat differently than the FCA. In particular, while the PFCRA also prohibits "presenting" false claims, that prohibition is not limited in any section of the PFCRA to false claims presented to a federal Government employee. 31 U.S.C. § 3802(a)(1). Liability under the PFCRA simply depends, as provided in its definition of "claim," upon the "presentation" of false claims for federal Government money or property—whether that property or money is in the possession of the federal Government, or in the possession of a private entity that received the federal property or money. 31 U.S.C. § 3801(a)(3)(B). As an administrative option for the Government, the PFCRA reaches only fraudulent

claims valued at $150,000 or less (*id.* at § 3803(c)(1)), and liability is capped at double damages and a civil penalty of $5,000. *Id.* at § 3802(a)(1). For fraudulent claims actionable under the PFCRA, the Government may still elect to pursue the matter under the FCA. *United States v. Watkins*, 2002 U.S. Dist. LEXIS 10029 *2 (N.D. Ill. 2002).

By construing the FCA so that "presentment" of false claims to a federal Government employee is always required, Petitioners would render the FCA inapplicable to much of the fraudulent conduct actionable under the PFCRA. This yields an anomalous result: The Government would have a remedy if someone submitted to a prime contractor a false claim for $150,000 of federal Government money, but the Government would have no remedy if that false claim sought $150,001. Congress certainly did not mean to incentivize larger frauds.

In the end, Petitioners' true objections are not to the Sixth Circuit's decision, but rather to the FCA itself. For instance, Petitioners say that if the Sixth Circuit's decision is affirmed, then the FCA will thereafter reach "every construction company hired as a subcontractor on a federal building . . . based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government." Pet. Br. 34-35, *citing Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002). This reach of the FCA is not new at all. As written and consistently applied, the FCA has long reached subcontractors even when their false claims are not "passed along" to the Government, since subcontractor violations of federal Government

requirements may cause a prime contractor's invoice to the Government to be false. *E.g. Bornstein*, 423 U.S. at 308. The restriction suggested by Petitioners, whereby subcontractors would be liable only if their own false claims are "passed along" to the Government, would immunize most subcontractors from FCA liability because their invoices (as in this case and in *Bornstein*) are usually not "passed along" to the Government.

Trying to support this result, Petitioners quote *Metric Constructors* for the proposition that "subcontractors in a government contract are not in privity with the government[.]" Pet. Br. 35. But contract privity is irrelevant, as this Court held almost 65 years ago that the FCA reaches "any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Marcus*, 317 U.S. at 544-45. The FCA's mission is to protect federal Government money and property from fraud, regardless of contract privity or whether a subcontractor's false invoice for federal money is "passed along" to a Government employee.

Petitioners close by arguing that this Court should restrictively interpret the FCA so that FCA litigants will not have to address the "complicated" problem of determining whether fraudulent claims sought federal, rather than non-federal funds. Pet. Br. 35-36. Tracing government funds is commonplace in a variety of lawsuits and is routinely dealt with by litigants and courts. Resolving evidentiary issues by restricting the FCA is not appropriate and, in any event, Respondents

solved any such issue in this case without any complication at all: The General Motors/Allison Program Manager testified that all funds paid to the Petitioners came from the Navy and, ultimately, the United States taxpayers. JA 110a-111a. Respondents also demonstrated that Petitioners falsely claimed those Navy funds because Petitioners had not satisfied the Navy's contract requirements. This case thus shows that a false invoice presented to a federal Government employee is certainly not the only method to prove that fraud has been practiced against Government funds.

This is, in fact, the crux of the Sixth Circuit's decision. Petitioners fraudulently obtained Navy funds by virtue of false claims, false statements and conspiracy. This could not be clearer fraud against the Government even if the prime-contractor shipyards were not positioned as intermediaries between Petitioners and the falsely-claimed federal money. The Navy received defective Gen-Sets, and the Sixth Circuit simply held that whether the Navy also received Petitioners' fraudulent invoices is irrelevant. This is an unexceptional application of the FCA and should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

James B. Helmer, Jr.
Counsel of Record
Paul B. Martins
Robert M. Rice
HELMER, MARTINS, RICE
& POPHAM CO., L.P.A.
600 Vine Street, Suite 2704
Cincinnati, OH 45202
(513) 421-2400
jhelmer@fcalawfirm.com

Scott A. Powell
Don McKenna
HARE, WYNN, NEWELL
& NEWTON
The Massey Building, Suite 800
2025 Third Avenue, North
Birmingham, AL 35203
(205) 328-5330

Counsel for Respondents Relators Roger L. Sanders and Roger L. Thacker

REPLY BRIEF

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No. 07-214

FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

[Additional Counsel Listed on Inside Cover]

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

I. SECTION 3729(a)(2) REQUIRES THE SUBMISSION OF A FALSE CLAIM TO THE GOVERNMENT FOR PAYMENT OR APPROVAL 4

A. The Text And Structure Of Section 3729(a)(2) Require Submission Of A False Claim To The Government 4

B. The Legislative History Does Not Support Respondents' Counter-textual Interpretation Of Section 3729(a)(2) 13

II. SECTION 3729(a)(3) REQUIRES PROOF OF A CONSPIRACY TO SUBMIT A FALSE CLAIM TO THE GOVERNMENT 15

III. REQUIRING SUBMISSION OF A CLAIM TO THE GOVERNMENT IS CONSISTENT WITH THE OBJECTIVES OF THE FCA 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Beck v. Prupis, 529 U.S. 494 (2000) 18

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6

Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980) 14

Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953) 15

Rainwater v. United States, 356 U.S. 590 (1958) 9

Tanner v. United States, 483 U.S. 107 (1987) 1, 2, 16, 17

United States v. Azzarelli Constr. Co., 647 F.2d 757 (7th Cir. 1981) 15

United States v. Bornstein, 423 U.S. 303 (1976) 10, 11

United States v. Catena, 500 F.2d 1319 (3d Cir. 1974) 19

United States v. Lagerbusch, 361 F.2d 449 (3rd Cir. 1966) 14

United States v. McNinch, 356 U.S. 595 (1958) 1, 21

United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409 (6th Cir. 2002) 12

United States ex rel. Davis v. Long's Drugs, Inc., 411 F. Supp. 1144 (S.D. Cal. 1976) 14, 15

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 9, 12, 14, 15

United States ex rel. Salzman v. Salant & Salant, Inc., 41 F. Supp. 196 (S.D.N.Y. 1938) 15

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 5, 17

STATUTES

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 13

18 U.S.C. § 287 19

18 U.S.C. § 371 16

18 U.S.C. § 641 7

18 U.S.C. § 1001 19

18 U.S.C. § 1031 3

18 U.S.C. § 1031(a) 5, 19

18 U.S.C. § 1031(g)(1) 19

31 U.S.C. § 3729(a)(1)-(7) 5

31 U.S.C. § 3729(a)(1) ..... *passim*

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) ..... *passim*

31 U.S.C. § 3729(c) 2, 5, 9

31 U.S.C. § 3802(a)(1) 5

42 U.S.C. § 1320a-7a(a)(1) 20

42 U.S.C. § 1320a-7b 20

REGULATIONS

48 C.F.R. § 9.400 19

OTHER AUTHORITIES

H.R. Rep. No. 97-651 (1982) 13

S. Rep. No. 99-345 (1986) 6, 14, 15, 19

REPLY BRIEF FOR PETITIONERS

Respondents and the United States urge upon this Court a wildly expansive construction of the False Claims Act ("FCA") that is unmoored from its text. That text is not at all ambiguous: Section 3729(a)(2) of the FCA imposes liability only when one seeks to have a false claim "paid or approved by *the Government*." 31 U.S.C. § 3729(a)(2) (emphasis added). Section 3729(a)(3) is similarly circumscribed, imposing liability only where one has conspired to "defraud *the Government*." *Id.* § 3729(a)(3) (emphasis added). There is no evidence in the record that petitioners' allegedly false claims were submitted to, much less paid by, "the Government." Both respondents and the United States acknowledge that petitioners' invoices were submitted only to, and paid only by, higher-tier contractors—not *the Government*. That should be the end of this case. For half a century, this Court has recognized that the FCA's reach is limited to "fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

Respondents and the United States contend that the antifraud objectives of the FCA demand that the phrase "paid . . . by the Government" in Section 3729(a)(2) be construed to mean "paid . . . with federal Government funds" (Resp. Br. 21), and that any fraudulent conspiracy to procure such "federal . . . funds" be recognized as one "to defraud the Government" within the meaning of Section 3729(a)(3). *Id.* at 49; *see also* U.S. Br. 11 (asserting that the FCA reaches any circumstance in which "the federal government was the ultimate source of the funds"). But this Court rejected a precisely analogous argument in *Tanner v. United States*, 483 U.S. 107 (1987), holding that a conspiracy to defraud a federally funded

private party did not constitute a "conspir[acy] . . . to defraud the United States." *Id.* at 132. And just as conspiring to defraud a federal grantee is not the equivalent of conspiring to "defraud the Government," being paid with funds that ultimately derive from the federal Treasury is not the same as being "paid . . . *by the Government*." The text of the FCA reaches the latter but not the former.

Respondents and the United States contend that this result cannot be reconciled with the FCA's definition of "claim," which—unlike the two statutory provisions under which respondents are attempting to impose liability—does refer to federal contractors and grantees. 31 U.S.C. § 3729(c). But respondents consistently—and impermissibly—read that definitional section in isolation from the liability-imposing language of Section 3729(a). The FCA does not impose liability on every "claim," or even every "false claim." Thus, the fact that the definition of "claim" encompasses requests for payment directed in the first instance to federal contractors does not establish that claims paid by a contractor are actually "paid . . . by the Government" within the meaning of Section 3729(a)(2) or that a conspiracy to defraud a contractor constitutes a "conspir[acy] to defraud the Government" under Section 3729(a)(3). Section 3729(c) must be read in conjunction with Section 3729(a), which limits liability to fraud directed toward the federal government itself.

Respondents and the United States similarly place great reliance on the fact that the verb "present" does not appear in Sections 3729(a)(2) or (a)(3). But they are wrong to ascribe such talismanic significance to this term. Although sometimes framed for shorthand purposes as whether Sections 3729(a)(2) and (a)(3) include a so-called "presentment

requirement," the issue before the Court is more accurately described as whether a claim must be "submitted to the federal government" for liability to be imposed under those sections. Pet. for Writ of Cert. i. The answer to *that question* is clearly "yes": "[T]he Government" cannot "pa[y] or approve[ ]" a claim unless that claim first has been submitted to the government for payment or approval. Similarly, in order to "conspir[e] to defraud the Government by getting a false or fraudulent claim allowed or paid," the defendant must conspire to get the government to allow or pay a claim—which again requires submission of the claim to the government itself. Petitioners' interpretation of the FCA therefore turns not on "bookkeeping idiosyncrasies" (U.S. Br. 7) but on the statute's plain language.

Ultimately, respondents' and the United States' contentions distill to a simple policy argument: Unless Sections 3729(a)(2) and (a)(3) are read to encompass false claims submitted to federally funded contractors but never submitted to the government, the FCA will not reach all frauds designed to obtain federal funds. This undoubtedly is true, but it is no cause for enlarging the FCA beyond its clear textual limits, nor for exposing all manner of private parties—anyone who transacts business with a federally funded entity—to the FCA's onerous sanctions and incentive-distorting *qui tam* provisions. Indeed, the United States has numerous remedies available against subcontractors who engage in fraud, including the Major Fraud Act, 18 U.S.C. § 1031, which has been construed to provide penalties of up to $10 million and ten years' imprisonment for fraudulent conduct by subcontractors on government projects, without regard to whether a fraudulent claim was ever submitted to the government itself. Particularly in

view of these alternative remedies, respondents' effort to expand the FCA to reach false claims never submitted to the government must be rejected.

I. SECTION 3729(a)(2) REQUIRES THE SUBMISSION OF A FALSE CLAIM TO THE GOVERNMENT FOR PAYMENT OR APPROVAL.

The plain language of Section 3729(a)(2) restricts the reach of that provision to fraud used to get false claims paid or approved by the federal government itself. The efforts of respondents and the United States to extend this statutory language to the use of false records or statements to get a false claim paid by a federally funded private party are uniformly unpersuasive.

A. The Text And Structure Of Section 3729(a)(2) Require Submission Of A False Claim To The Government.

According to respondents and the United States, a claim is "paid . . . by the Government" within the meaning of Section 3729(a)(2) whenever a private party uses funds that originated with the federal government to make a payment. Resp. Br. 25; *see also* U.S. Br. 9. This "indirect payment" theory is nothing more than a poorly disguised attempt to rewrite the FCA.

1. Section 3729(a)(2) refers to a claim "paid or approved *by the Government*." Respondents have never suggested that petitioners' allegedly false statements were made to get the government itself to pay or approve their allegedly false claims. Respondents have instead asserted only that petitioners' allegedly false statements were made with the intention of securing payment from the federally funded prime contractors and higher-tier subcontractors from whom petitioners actually received payment.

But if Congress had intended for Section 3729(a)(2) to encompass claims paid by private parties with federal funds, then it would have drafted the provision to reach claims "paid with Government funds" or claims "paid or approved by a recipient of Government funds." Indeed, Congress is well aware of the distinction between the government itself and government contractors and grantees. The FCA itself recognizes that distinction. *Compare* 31 U.S.C. § 3729(a)(1)-(7) (referring to the "Government"), *with id.* § 3729(c) (referring to a "contractor, grantee, or other recipient" that is "reimburse[d]" by the "Government"). Congress is also well aware of how to draft a statute that is broad enough to reach fraudulent conduct by government subcontractors regardless of whether that conduct ever resulted in submission of a claim to the government. It did so when it enacted the Program Fraud Civil Remedies Act ("PFCRA"), which extends liability to fraudulent claims for federal funds that are never submitted to the government. 31 U.S.C. § 3802(a)(1); *see also* 18 U.S.C. § 1031(a) (punishing fraud by any person "in any procurement of property or services . . . as a subcontractor or supplier on a contract in which there is a prime contract with the United States").[1] In contrast, Congress's use of the "paid . . . by the Govern-

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[1] Respondents' reliance on the PFCRA (at 56) is badly misplaced. While it may have been anomalous to subject States to the onerous liability provisions of the FCA where the PFCRA exempted the States from "relatively smaller damages" (*Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000)), there is no such anomaly here. It was eminently reasonable for Congress to limit the FCA's more punitive sanctions to fraud against the government itself while extending the PFCRA's less severe penalties to a wider class of fraudulent conduct.

ment" formulation in Section 3729(a)(2) demonstrates that it intended for that provision to have a considerably narrower scope. *See also* S. Rep. No. 99-345, at 9 (1986) ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government *to pay out* sums of money or to deliver property or services.") (emphasis added).

Moreover, the "indirect payment" theory endorsed by respondents and the United States cannot be squared with the statutory context in which the words "paid . . . by the Government" appear. Section 3729(a)(2) encompasses fraudulent efforts to get a claim "paid *or approved* by the Government." Basic rules of syntax require that the verbs "paid" and "approved" have the same subject and object. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret . . . [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citation omitted). In Section 3729(a)(2), the object of both "paid" and "approved" is the allegedly false claim. On respondents' and the United States' construction of the statute, the subject of "paid"—and therefore "approved"—is any federally funded recipient of a false claim. But approval of a claim by the government indisputably requires action by a government official—not even respondents contend that a claim approved by a federal grantee is actually "approved by the Government." Respondents' and the United States' interpretation thus requires "approved" and "paid" to take different subjects—while any federally funded entity can "pa[y]" a false claim, only the government itself may "approve[ ]" such a claim. That

result is incompatible with the syntactical structure of Section 3729(a)(2) and should be rejected.[2]

2. Section 3729(c)'s definition of "claim" does not alter this conclusion. Although a "claim" includes requests for payment initially directed to a federally funded contractor, such claims can only give rise to liability under Section 3729(a)(2) where the defendant uses a false record or statement to get "the Government" to "pa[y]" such a claim. Thus, while the definition of "claim" makes clear that a claim need not be submitted to the federal government in the first instance, liability under Section 3729(a)(2) still requires the eventual submission of a claim to the government for payment or approval. Otherwise, the government could not pay or approve the claim.

Respondents and the United States suggest that this reading of the interaction between Sections 3729(a)(2) and 3729(c) renders the definition of "claim" superfluous because the "causes to be presented" language of Section 3729(a)(1) already en-

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[2] Respondents emphasize that a person "can be guilty of embezzling 'money or things of value of the United States' (18 U.S.C. § 641) even though the federal funds are 'administered by a nonfederal agency'" (Resp. Br. 43 n.8), but, in doing so, they miss the point. Whether, in some circumstances, money paid by the United States to a grantee retains its federal character does not remotely affect the question before this Court—whether claims paid by a private party with federal funds are "paid . . . by the Government." Moreover, it is far from "undisputed" (Resp. Br. 5) that the contractual payments to petitioners were made with federal funds, and if this case is remanded for retrial under respondents' theory of the FCA, they will be required to establish—both factually and legally—that the payments that petitioners received from prime contractors and higher-tier subcontractors were actually made with government funds.

compassed a defendant's submission of a false claim to a federal contractor who then passed the claim along to the government. *See* Resp. Br. 28; U.S. Br. 15. They are incorrect. Section 3729(a)(1) does not apply where a defendant submits a false statement in support of a false claim that a third party has submitted to a federally funded contractor. If that claim (and the defendant's supporting documentation) are passed along to the government by the contractor, the defendant cannot be said to have "caused" the false claim to be presented because the defendant's supporting documentation did not render the claim false or induce the contractor to pass the claim along to the government. Section 3729(c) clarified that such a defendant could be held liable under Section 3729(a)(2), even though the claim in question was not initially submitted to the federal government.[3]

Indeed, it is respondents and the United States who render a portion of the FCA's language superfluous through their reading of Section 3729(c). If the definition of "claim" in Section 3729(c) extended Section 3729(a)(2) to anyone who uses a false record or statement to get a false claim paid with federal

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[3] Similarly, the United States is mistaken when it contends that "petitioners' construction of Section 3729(c) . . . accords operative effect to the definition of 'claim' only when the contractor or grantee submits an after-the-fact request for reimbursement" and thus nullifies the language in Section 3729(c) that extends the definition of "claim" to situations where the United States "provides any portion of the money." U.S. Br. 16. To the contrary, that language clarifies that the FCA applies not only where a federally funded contractor submits a defendant's claim to the government for reimbursement but also where a federal grantee receives an advance payment of federal funds that it distributes to a claimant after its claims have been passed along to, and approved by, the United States.

funds, then the "by the Government" language in Section 3729(a)(2) would be deprived of any operative effect because its meaning would already be conveyed by reading the remaining language of Section 3729(a)(2) in conjunction with Section 3729(c). *See* Pet. Br. 18.

Respondents seek to evade this inevitable consequence of their statutory construction by suggesting that, without the words "by the Government," Section 3729(a)(2) would reach efforts to get false claims paid "by anyone," without regard to whether the fraud had any connection to the federal government. Resp. Br. 30. Respondents contend that the insertion of the "by the Government" language as part of the 1986 FCA amendments was therefore necessary "to clarify, in light of the additional broad definition of 'claim,' that Section (a)(2) was limited to only false claims for federal Government money or property" and did not extend to strictly private fraud. *Id.* at 38-39. But respondents overlook the fact that the FCA has always been understood to be limited to fraud upon the government (*see Rainwater v. United States*, 356 U.S. 590, 592 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943)) and that, consistent with that history, the definition of "claim" is restricted to requests for payment initially directed to federally funded parties. *See* 31 U.S.C. § 3729(c) (referencing "request[s]" or "demand[s] . . . to a contractor, grantee, or other recipient if the United States Government provides any portion of the money . . . or if the Government will reimburse such contractor, grantee, or other recipient"). The addition of that definition thus would not have necessitated clarification that the FCA does not extend to private fraud wholly unconnected to the government. The "by the Government" language must

therefore have been added for a different reason: to clarify that, even though the definition of "claim" is broad enough to reach requests for payment initially submitted to federally funded private parties, that provision did not alter the well-established principle that the FCA is limited to fraud against the federal government itself.

3. Respondents' contention that requiring submission of a claim to the government "adds an element of liability to" Section 3729(a)(2) is similarly misplaced. Resp. Br. 26. Petitioners are not arguing, as respondents suggest, that liability under Section 3729(a)(2) is limited to circumstances where a false record or statement is used to get a claim "'presented to the Government *and* paid or approved by the Government.'" *Id.* (emphasis added). Section 3729(a)(2) imposes liability on defendants who use a false record or statement to get a false claim "paid or approved by the Government," not to get a claim submitted to the government. Evidence of submission of a claim to the government—whether by the defendant or a higher-tier contractor—is essential to liability under Section 3729(a)(2) because it establishes that the defendant made or used the false statement to get a false claim "paid or approved *by the Government*," rather than by a private entity. But the defendant's participation in the submission of the claim to the government is not necessary for Section 3729(a)(2) liability to attach.[4]

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[4] *United States v. Bornstein*, 423 U.S. 303 (1976), does not remotely establish, as respondents suggest, that "the focus [of this case] must be on the 'false' conduct of the Petitioner subcontractors," without regard to whether the prime contractors ever passed along or otherwise submitted false claims to the federal government. Resp. Br. 14; *see also* U.S. Br. 29. In

Moreover, even if liability under Section 3729(a)(2) could attach without proof that a claim was actually submitted to the government, the plaintiff would still be required to establish that the defendant made or used a false statement with the intention of getting the government to pay or approve a false claim—a showing that respondents here stubbornly refused even to attempt to make. *See* Pet. App. 5 n.3.[5]

Respondents are therefore also incorrect when they suggest that petitioners' reading of Section 3729(a)(2) would render that provision superfluous. *See* Resp. Br. 28. Sections 3729(a)(1) and (a)(2) serve distinct functions. Section 3729(a)(1) applies to the act of presenting a false claim to the government or engaging in conduct that "causes" such a claim to be presented. Section 3729(a)(2) applies to defendants who use a false record or statement in an effort to get

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Bornstein, there was no dispute that false claims had been submitted to the government—indeed, the Court emphasized that the defendant was "liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States" (429 U.S. at 311)—and the only issue before the Court was the procedure for computing the number of false claims for which the defendant was liable.

[5] For this reason, the United States is incorrect to suggest (at 19 n.5) that, even under petitioners' reading of the FCA, the evidence presented at trial was sufficient to go to a jury. There was absolutely no evidence at trial regarding the prime contractors' submission of invoices to the federal government. Thus, even if the jury could have inferred that the prime contractors submitted some such invoices, there was no evidentiary basis for finding those claims to be false because their content was completely unknown.

a false claim paid or approved by the government. *See Hess*, 317 U.S. at 544 (the predecessor to current Section 3729(a)(2) "include[d] those who do the forbidden acts for the purpose of 'aiding to obtain' payment of fraudulent claims"). The defendant need not have submitted the claim or engaged in conduct that caused the claim to be submitted to be liable under Section 3729(a)(2).

In fact, it is respondents' reading of Sections 3729(a)(1) and (a)(2) that would result in superfluity. If Section 3729(a)(2) did not require submission of a false claim to the government, then any plaintiff who would have otherwise filed suit under Section 3729(a)(1) would instead file suit under Section 3729(a)(2)—in order to avoid the presentment requirement—and simply allege that the falsity in the claim at issue constituted a false statement used "to get a false claim . . . paid." *See, e.g., United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414 (6th Cir. 2002) (Medicare cost reports held to be both false claims under Section 3729(a)(1) and false records or statements used to get a false claim paid under Section 3729(a)(2)). This Court should reject a reading of the FCA that would render one of its two principal liability-creating provisions utterly superfluous.[6]

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[6] Respondents suggest that their reading of Section 3729(a)(2) would not allow plaintiffs to circumvent the presentment requirement of Section 3729(a)(1) because "false 'records or statements' are not the only types of actionable claims." Resp. Br. 31 (emphasis omitted). While respondents may be correct that false claims can come in many forms, they all have one thing in common: falsity. Thus, whatever the form of the claim at issue, if submission of a claim to the government were not required in Section 3729(a)(2), any plaintiff could bring suit under that provision and allege that the false aspect of the

B. The Legislative History Does Not Support Respondents' Counter-textual Interpretation Of Section 3729(a)(2).

Respondents' attempt to muster support for their interpretation of Section 3729(a)(2) from the FCA's legislative origins is also unavailing.

Respondents and the United States contend that the original version of the FCA did not require submission of a claim to the government because liability could be imposed on anyone who "ma[d]e . . . or present[ed] . . . any [false] claim upon or against the Government." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696. They argue that a claim can be *made* upon the government without ever being *submitted* to the government. Resp. Br. 37; U.S. Br. 21. These efforts to distinguish between making a claim upon the government and presenting a claim upon the government are conclusively undermined by the fact that Congress removed the reference to "mak[ing]" a false claim in 1982. Because the 1982 FCA amendments "ma[de] no substantive change in the law" (H.R. Rep. No. 97-651, at 3 (1982)), the elimination of the "mak[ing]" a false claim language cannot have narrowed the statute's scope. "Mak[ing]" a false claim "upon or against the Government" must therefore have been functionally equivalent to "present[ing]" a false claim to the government—and liability under either clause would have required submission of a claim to the government.

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claim constituted a "false record or statement" that was used "to get a false or fraudulent claim paid."

The legislative history accompanying the 1986 FCA amendments is equally unhelpful to respondents' position.[7] The House and Senate Reports indicate that Congress added the definition of "claim" in Section 3729(c) in order to codify the result in cases holding that FCA liability may attach where a false claim is submitted to a federally funded intermediary and then passed along to the government. *See, e.g.*, S. Rep. No. 99-345, at 10 (citing *Hess*, 317 U.S. 537). Although the Senate Report favorably cited two cases in which FCA liability was imposed even though a claim had seemingly never been submitted to the government (*see id.* (citing *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966) and *United States ex rel. Davis v. Long's Drugs, Inc.*, 411

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[7] Any support that respondents could have otherwise obtained from the legislative history is foreclosed by the fact that the 1986 Senate and House Reports were issued before the "by the Government" language, which clarified that the provision requires submission of a claim to the government itself for payment or approval, was added to Section 3729(a)(2). Respondents suggest that "it is not reasonable to suppose that Congress silently and simultaneously reversed course" by first adding the definition of "claim" to purportedly extend the FCA to fraud against federally funded private entities and then, without comment, adding the "by the Government" language to clarify that a claim must be submitted to the government for payment or approval before liability can attach. Resp. Br. 39 n.6; *see also* U.S. Br. 14 n.3. This Court has repeatedly made clear, however, that a statute's plain language controls even in the face of congressional silence. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute"). The absence of congressional deliberations thus cannot alter the fact that the "by the Government" language of Section 3729(a)(2) requires a claim to be submitted to the government for payment or approval.

F. Supp. 1144 (S.D. Cal. 1976))), it immediately followed the citations to each of those decisions with a citation to a case in which a claim was submitted to a federally funded private entity and then passed along to the government. *See id.* (citing *Hess*, 317 U.S. 537, and *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953) ("The fact that the claims in this case were not presented directly to the government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute."). These conflicting citations are too slim a reed on which to rest the weight of respondents' countertextual argument that Congress—by adding the "by the Government" language to the end of Section 3729(a)(2)—intended to extend the FCA to claims never submitted to the government.[8]

II. SECTION 3729(a)(3) REQUIRES PROOF OF A CONSPIRACY TO SUBMIT A FALSE CLAIM TO THE GOVERNMENT.

Like Section 3729(a)(2), the language of Section 3729(a)(3)—which reaches anyone who "conspires to

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[8] The Senate Report's cryptic reference to *United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938), is no more illuminating. In that case, the district court's conclusion that fraudulent claims submitted to the Red Cross did not trigger FCA liability rested at least in part on the fact that the Red Cross received only a one-time "donation from the government." *Id.* at 197. *Salzman* thus relied on similar reasoning to *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that the FCA did not extend to fraud upon federal grantees who received a fixed-sum payment from the government, whether or not a false claim was ever submitted to the government. *Id.* at 762. Congress explicitly intended for the 1986 FCA amendments to overrule *Azzarelli* and similarly reasoned cases. S. Rep. No. 99-345, at 15.

defraud the Government by getting a false or fraudulent claim allowed or paid"—restricts the statute's reach to fraud against the federal government. This Court has already concluded that a conspiracy to defraud a federally funded private entity does not constitute a "conspir[acy] ... to defraud the United States" unless the defendant "conspired to cause [the private company] to make misrepresentations to the [federal government]." *Tanner v. United States*, 483 U.S. 107, 132 (1987). Indeed, the statute at issue in *Tanner* was worded in broader terms than Section 3729(a)(3) because it applied to conspiracies to "defraud the United States ... *in any manner*." 18 U.S.C. § 371 (emphasis added). If submitting a false claim to a federally funded private entity does not fall within the expansive language of Section 371, it follows *a fortiori* that it cannot come within the narrower language of Section 3729(a)(3), which is limited to conspiracies to defraud the government "by getting a false or fraudulent claim allowed or paid."

The United States contends that *Tanner* is irrelevant because the Court there "*agreed* with the government that 'under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud.'" U.S. Br. 23 (quoting *Tanner*, 483 U.S. at 129) (emphasis in original). In this case, however, the government itself was not the "target" of petitioners' purported fraud because petitioners' alleged conspiracy did not "cause [the prime contractors] to make misrepresentations to the [federal government]" by passing along or otherwise making false claims to the government. *Tanner*, 483 U.S. at 132. The "targets" of the alleged fraud were instead the private contractors who received claims for payment from petitioners and paid those claims.

Nor can *Tanner* be distinguished, as respondents suggest, on the ground that the Court was construing a criminal statute. Resp. Br. 46-47 & n.9. This Court has recognized that the FCA itself has many of the characteristics of a criminal statute. *See Stevens*, 529 U.S. at 784 ("the FCA imposes damages that are essentially punitive in nature"). Moreover, *Tanner*'s holding was not premised on any of the interpretive canons peculiar to the criminal setting, which were referenced by the Court only in passing. 483 U.S. at 131. It instead rested on the fact that "the interpretation of § 371 proposed by the Government"—that a conspiracy to defraud a federally funded private entity constituted a "conspir[acy] . . . to defraud the United States"—"ha[d] not even an arguable basis in the plain language of § 371." *Id.*

The United States also suggests that respondents' Section 3729(a)(3) claim should have gone to the jury because "it was an essential feature of the alleged fraudulent scheme that the Navy be kept unaware of the defects in equipment for which the United States had contracted and paid." U.S. Br. 22. But it was no less an "essential feature" of the fraudulent scheme in *Tanner* to keep the United States unaware of the defendants' fraudulent procurement activity than it was here to keep the United States ignorant of petitioners' allegedly deficient subcontracting work. The United States is thus not a "target" of a fraudulent conspiracy simply because it was "essential" that the government be kept in the dark about the activity. Indeed, every perpetrator of fraud—no matter whom he is defrauding—wants to conceal his activities from the federal government.

Respondents further contend that, if Section 3729(a)(3) requires a conspiracy to submit a false

claim to the government, then all of the conduct covered by Sections 3729(a)(1) and (a)(2) will be encompassed by Section 3729(a)(3), rendering that provision "meaningless." Resp. Br. 50. Section 3729(a)(3), however, enables the government to bring suit against "co-conspirators who might not themselves have violated" either Section 3729(a)(1) or (a)(2) but who conspired with others to violate those provisions. *Beck v. Prupis*, 529 U.S. 494, 507 (2000).[9]

III. Requiring Submission Of A Claim To The Government Is Consistent With The Objectives Of The FCA.

Both respondents and the United States contend that reversal of the decision below will undermine the antifraud objectives of the FCA and leave the government without a remedy for subcontractor fraud. These policy arguments are misdirected to this Court and unpersuasive in any event.

Respondents contend that, if liability under Sections 3729(a)(2) and (a)(3) is restricted to cases in which a false claim has been submitted to the government, then the government will be unable to seek redress for subcontractor fraud on federal projects.

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[9] Neither respondents nor the United States provides a sound basis for distinguishing *Beck* or discounting the support it provides for the conclusion that Section 3729(a)(3) is a derivative conspiracy provision. *See* Resp. Br. 51 n.12; U.S. Br. 24. *Beck* established that a plaintiff can "bring suit for civil conspiracy only if he ha[s] been injured by an act that was itself tortious." 529 U.S. at 501. Thus, in a suit in which the government was allegedly injured by fraudulent conduct that violated Sections 3729(a)(1) and (a)(2), a conspiracy claim under Section 3729(a)(3) must fail if a defendant cannot be held liable under either of those sections due to the absence of proof that a claim was ever submitted to the government.

In reality, the government has regularly invoked several highly effective tools to police fraud by subcontractors, including the Major Fraud Act, which imposes penalties of up to $10 million and ten years' imprisonment on a "subcontractor or supplier on a contract in which there is a prime contract with the United States" where the subcontractor "knowingly executes . . . any scheme or artifice with the intent . . . to obtain money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1031(a). The Major Fraud Act even authorizes the Attorney General to pay rewards to private citizens who report fraud to the government and thus provides the same whistleblowing incentive as the FCA. *Id.* § 1031(g)(1). Other sanctions that have been imposed upon fraudulent subcontractors include criminal liability for making false statements under 18 U.S.C. § 1001 and debarment from future government contracting opportunities. *See* 48 C.F.R. § 9.400.

Respondents are also incorrect when they contend that petitioners' reading of Sections 3729(a)(2) and (a)(3) would insulate Medicare and Medicaid fraud from FCA liability. Resp. Br. 54. In many cases, the claims that are submitted to a state or private health-care intermediary are passed along to the federal government—as Congress was no doubt aware when it enacted the 1986 FCA amendments. *See* S. Rep. No. 99-345, at 21-22 (citing *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974) (upholding a conviction under the criminal version of the FCA, 18 U.S.C. § 287, where a physician's false Medicare claim was passed along to the government by a private intermediary)). Moreover, even if there are situations in which false Medicare and Medicaid claims are not submitted to the federal government

itself, there are civil and criminal provisions specifically designed to address Medicare and Medicaid fraud. *See* 42 U.S.C. § 1320a-7a(a)(1); *id.* § 1320a-7b.

Thus, while a decision rejecting the Sixth Circuit's expansive interpretation of the FCA would leave the federal government with a number of powerful tools with which to combat fraud, a decision endorsing the Sixth Circuit's countertextual understanding of the FCA would—as respondents' own *amici* recognize—extend this specialized antifraud statute to any claim submitted to any private company, local government, or educational institution that receives funding from the federal government, even if the false claim does not injure the government. *See* Taxpayers Against Fraud Br. 20 ("Congress clearly intended for the FCA to apply even when no loss would result to the federal Government.").

Indeed, the United States appears to recognize the staggering implications of the Sixth Circuit's holding, and attempts to cabin its reach by suggesting that the FCA should apply to a claim submitted to a federally funded private entity only when the "contractor or grantee, in making the payment, was acting in furtherance of its responsibilities under the relevant federal program." U.S. Br. 30 n.8. There is nothing, however, in any provision of the FCA—including Section 3729(c) (which encompasses *any* "recipient of federal funds")—that substantiates this furtherance-of-federal-responsibilities standard. It emerges *ex nihilo*. If the "paid . . . by the Government" language of Section 3729(a)(2) does encompass, as respondents and the United States urge, any claim paid with government funds, there is no textual, structural, or historical basis for confining the

FCA's scope to claims paid by federal contractors acting in their federal capacity.

Under the Sixth Circuit's holding, then, *any* claim for payment submitted to a federally funded contractor, federal grantee, or other recipient of federal funds could give rise to treble damages and civil penalties under the FCA. The statute's language, structure, and history establish that Congress intended no such thing when it enacted the FCA to remedy "fraud practiced on the Government." *McNinch*, 356 U.S. at 599.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GLENN V. WHITAKER
VICTOR A. WALTON, JR.
MICHAEL J. BRONSON
PATRICK M. HAGAN
VORYS, SATER, SEYMOUR & PEASE LLP
221 East Fourth Street
Atrium Two, Suite 2100
P.O. Box 0236
Cincinnati, OH 45201
(513) 723-4000

Counsel for Petitioner Allison Engine Company, Inc.

THEODORE B. OLSON
Counsel of Record
RAYMOND B. LUDWISZEWSKI
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners Allison Engine Company, Inc., and General Motors Corporation

LAWRENCE R. ELLEMAN
DINSMORE & SHOHL, L.L.P.
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Counsel for Petitioner
Southern Ohio
Fabricators, Inc.

WILLIAM A. POSEY
W. JEFFREY SEFTON
KEATING, MUETHING &
KLEKAMP, PLL
1800 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
(513) 579-6400

Counsel for Petitioner
General Tool Company

JAMES J. GALLAGHER
SUSAN A. MITCHELL
MCKENNA LONG &
ALDRIDGE, L.L.P.
444 S. Flower Street, 6th Floor
Los Angeles, CA 90071
(213) 688-1000

Counsel for Petitioner
General Motors Corporation

DAVID P. KAMP
WHITE GETGEY & MEYER
1700 4th & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 241-3685

Counsel for Petitioner
General Motors Corporation

February 13, 2008

AMICUS CURIAE BRIEF

82

(15)

38pgs No. 07-214

FILED
JUN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
ROGER L. SANDERS AND ROGER L. THACKER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether respondents' claims under 31 U.S.C. 3729(a)(2) and (3) against subcontractors on a federal project should have been allowed to go to the jury even though respondents did not introduce into evidence invoices submitted by the prime contractors to the federal government.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument 7
A. Section 3729(a)(2) of Title 31 does not require proof that a false claim was "presented" directly to the federal government 8
1. Petitioners' alleged conduct falls squarely within the ordinary meaning of Section 3729(a)(2) 9
2. Petitioners' presentment theory cannot be squared with related statutory provisions 12
a. Petitioners' presentment theory is inconsistent with the FCA's definition of "claim" 13
b. Petitioners' contention that Section 3729(a)(2) imposes an implicit presentment requirement is inconsistent with Section 3729(a)(1) 17
3. Petitioners' reliance on current Section 3729(a)(2)'s statutory antecedents is misplaced 20
B. The court of appeals correctly held that respondents' conspiracy claims under 31 U.S.C. 3729(a)(3) should have been allowed to go to the jury 22
C. A categorical requirement that a false claim be presented to the government would disserve the purposes of the FCA 25
Conclusion 32

TABLE OF AUTHORITIES

Cases: Page

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 18
Beck v. *Prupis*, 529 U.S. 494 (2000) 24, 25
Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 27
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 12
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 12
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 27
Harrison v. *Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) 19
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 12
Rex Trailer Co. v. *United States*, 350 U.S. 148 (1956) ... 19
Russello v. *United States*, 464 U.S. 16 (1983) 18
Shaw v. *AAA Eng'g & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000) 19
Tanner v. *United States*, 483 U.S. 107 (1987) 23
United States v. *Bornstein*, 423 U.S. 303 (1976) 29
United States v. *Neifert-White Co.*, 390 U.S. 228 (1968) 8, 10, 11
United States v. *Riviera*, 55 F.3d 703 (1st Cir. 1995) 19
United States ex rel. Augustine v. *Century Health Servs. Inc.*, 289 F.3d 409 (6th Cir. 2002) 19
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 11, 26, 28

Cases—Continued: Page

United States ex rel. Siewick v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000) 19
United States ex rel. Totten v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005) 5, 9, 16, 22, 27
United States Nat'l Bank v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 12

Statutes and rule:

False Claims Act, ch. 67, § 1, 12 Stat. 696-697 21
False Claims Act, 31 U.S.C. 3729 *et seq.* 1
31 U.S.C. 3729 13
31 U.S.C. 3729(a) 3, 12, 15, 30
31 U.S.C. 3729(a)(1) ..... *passim*
31 U.S.C. 3729(a)(1)-(7) 2
31 U.S.C. 3729(a)(2) ..... *passim*
31 U.S.C. 3729(a)(3) ..... *passim*
31 U.S.C. 3729(a)(7) 27, 28
31 U.S.C. 3729(c) ..... *passim*
31 U.S.C. 3729(d) 21
31 U.S.C. 3730(a) 3
31 U.S.C. 3730(b)(1) 3
31 U.S.C. 3730(d) 3
False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2(7), 100 Stat. 3154 2
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 24

Statute and rule—Continued: Page

18 U.S.C. 1962(d) 24
18 U.S.C. 371 23
Fed. R. Civ. P. 50(a) 4

Miscellaneous:

132 Cong. Rec. (1986):
p. 22,330 14
p. 22,336 14
p. 22,345 14
pp. 28,580-28,581 14
H.R. 4827, 99th Cong., 2d Sess. (1986) 14
H.R. Rep. No. 660, 99th Cong., 2d Sess. (1986) 13, 14
S. Rep. No. 345, 99th Cong., 2d Sess. (1986) 2, 13, 14, 22, 26

In the Supreme Court of the United States

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ALLISON ENGINE COMPANY, INC., ET AL.,
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves a *qui tam* suit under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* At trial, respondents introduced evidence that subcontractors on a federal project had submitted false claims to the prime contractors, but respondents did not seek to prove that the false claims were resubmitted to a federal officer or employee. The question presented is whether the subcontractors may be held liable under 31 U.S.C.

3729(a)(2) or (3) absent proof that false claims were "presented" to the federal government. Because the FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and because the government receives the bulk of any award obtained through a *qui tam* action, the United States has a substantial interest in the proper construction of the Act.

STATEMENT

1. Enacted in 1863, the FCA "has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (*1986 Senate Report*). In its current form, the Act imposes civil liability for a variety of deceptive practices involving government funds and property. See 31 U.S.C. 3729(a)(1)-(7). Inter alia, the Act renders liable any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1); any person who "knowingly, makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. 3729(a)(2); and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," 31 U.S.C. 3729(a)(3). As a result of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2(7), 100

Stat. 3154, the FCA defines the term "claim" to include, under specified circumstances, requests for money submitted to federal "contractor[s], grantee[s], or other recipient[s]" of federal funds. 31 U.S.C. 3729(c).

A person who violates the FCA is liable to the United States government for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a). Suits to collect the civil penalties and statutory damages may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

2. This case arises from prime contracts awarded by the Navy to Bath Iron Works (Bath) and Ingalls Shipbuilding, Inc. (Ingalls), to build more than 50 new guided-missile destroyers for a price of approximately $1 billion per ship. Bath and Ingalls, in turn, awarded subcontracts to petitioner Allison Engine Co., Inc. (Allison) to provide "Gen-Sets," the generators that provide electrical power for the destroyers. Petitioners General Tool Company (GTC) and Southern Ohio Fabricators, Inc. (SOFCO) were subcontractors under Allison. Each individual Gen-Set costs $3 million, and each destroyer requires three Gen-Sets. See Pet. App. 2a; C.A. App. 279, 286, 317.

Respondents Roger Sanders and Roger Thacker brought a *qui tam* action against the subcontractors, alleging violations of 31 U.S.C. 3729(a)(1), (2), and (3).

The prime contractors were not named as defendants. Respondents alleged that the subcontractors had delivered Gen-Sets that did not conform to numerous quality provisions in the relevant contracts, but that the subcontractors had nevertheless made demands for payment for the Gen-Sets and had falsely certified that the Gen-Sets had been built in conformance with all contract provisions. See Pet. App. 3a-5a; J.A. 24a-27a. The government declined to intervene to take over the suit.[1]

The case was tried before a jury. Respondents introduced evidence that Allison had presented claims for payment to the prime contractors, and that subcontractors GTS and SOFCO had presented claims to Allison. Respondents also introduced evidence that funds obtained from the government were used to pay the subcontractors. Respondents did not, however, introduce into evidence the invoices presented by the prime contractors to the Government. See Pet. App. 4a-5a; C.A. App. 331-334, 638, 655, 837, 914, 966.

At the close of respondents' case, petitioners moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). Petitioners argued that respondents' evidentiary showing was inadequate because it did not include proof that false claims were pre-

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[1] Respondents also filed a second *qui tam* suit against the same defendants, alleging that petitioners had violated the FCA by failing to disclose required cost information when providing the Navy with an Engineering Change Proposal for a redesign of the Gen-Sets. See Pet. App. 3a-4a, 25a, 27a-28a. The district court granted summary judgment for petitioners in that action, and the court of appeals affirmed. See *id.* at 25a-33a. Respondents have not sought review of that ruling in this Court.

sented to the government. See Pet. App. 40a-41a. The district court granted petitioners' motion. *Id.* at 38a-61a. Relying substantially on *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (*Totten*), cert. denied, 544 U.S. 1032 (2005), the court concluded that, in the absence of proof that false claims were presented to the federal government, respondents' evidence was legally insufficient. Pet. App. 60a; see *id.* at 5a.

3. The court of appeals reversed in relevant part. Pet. App. 1a-37a. The court of appeals did not dispute the district court's conclusion that liability under 31 U.S.C. 3729(a)(1) requires proof that false claims were presented to the United States. The court of appeals held, however, that the district court had erred in granting judgment as a matter of law with respect to respondents' allegations under Section 3729(a)(2) and (3). The court explained that "[o]nly subsection (a)(1) of [Section 3729(a)] makes any mention of presenting a claim to the government or Armed Forces. Subsections (a)(2) and (a)(3), which are separate bases for liability, contain no such presentment language." Pet. App. 7a. The court further observed that Section 3729(c)'s definition of "claim" reinforces the conclusion that presentment to the United States is not an invariable requirement for liability under the FCA. *Id.* at 7a-8a. The court of appeals also explained that its construction of Section 3729(a)(2) and (3) was "solidifie[d]" by the legislative history of the 1986 FCA amendments, *id.* at 8a-9a, and accorded with this Court's consistently broad construction of the FCA as encompassing all fraudulent schemes to obtain federal money or property, see *id.* at 15a-16a.

The court of appeals further held that respondents had "presented sufficient proof to avoid judgment as a matter of law" under a correct understanding of 31 U.S.C. 3729(a)(2) and (3). Pet. App. 24a. The court explained that "all of the money paid to Allison, GTC, and SOFCO came from the United States government," and that respondents had "put forth evidence of knowledge on the part of the contractors that the Gen-Sets did not conform to Navy regulations and that the invoices were paid using government funds." *Ibid.*

Judge Batchelder dissented from the court of appeals' holding that respondents' allegations under 31 U.S.C. 3729(a)(2) and (3) should have been allowed to go to the jury. Pet. App. 33a-37a.

SUMMARY OF ARGUMENT

A. Section 3729(a)(2) of Title 31, which prohibits the making or use of "a false record or statement to get a false or fraudulent claim paid or approved by the Government," does not require proof that a false claim was presented to a federal official. In common parlance, bills or expenses are naturally said to be "paid by" the person who absorbs the relevant costs, even if some other person is responsible for the mechanics of transferring funds. Other FCA provisions, as well as the legislative history of the 1986 amendments to the Act, confirm that natural reading of the Section 3729(a)(2)'s text.

B. The FCA's civil-conspiracy provision, 31 U.S.C. 3729(a)(3), does not require an agreement to present false claims to a federal official. By its plain terms, Section 3729(a)(3) prohibits any conspiracy having a particular objective ("to defraud the Government") and a particular agreed-upon means ("by getting a false or fraudulent claim allowed or paid"). Respondents' theory in

this case—*i.e.*, that petitioners agreed to submit claims for payment that concealed defects in Gen-Sets manufactured for installation on Navy destroyers—is covered by Section 3729(a)(3)'s text and is consistent with this Court's interpretations of other conspiracy provisions.

C. Acceptance of petitioners' theory would disserve the purposes of the FCA by making a defendant's liability turn on bookkeeping idiosyncrasies rather than on the substance and ultimate effect of the defendant's fraud. No one would doubt the application of the FCA to a contractor who defrauded the government by installing substandard Gen-Sets on Navy destroyers. The public fisc is no less endangered if the same result is achieved by a subcontractor intent on deceiving both the prime contractor and the Navy. And given the ubiquity of subcontracting in government contracting, and the frequent use of intermediaries in federal grant programs, it would make no sense to limit liability in the way petitioners propose. Even without engrafting a requirement that false claims be presented to a federal official, Section 3729(a)(2) and (3) can sensibly be read as limited to frauds that endanger the federal fisc. As the instant case demonstrates, a prime contractor's invoices to the federal government need not always be introduced into evidence in order to prove that a subcontractor's fraud injured the United States.

ARGUMENT

The court of appeals correctly held that respondents' claims under 31 U.S.C. 3729(a)(2) and (3) should have been allowed to go to the jury. Respondents have alleged that petitioners knowingly delivered defective

Gen-Sets for installation in Navy destroyers; that petitioners sought to obtain full payment for the defective Gen-Sets by falsely certifying that the equipment complied with all contractual and regulatory requirements; and that the prime contractors paid for the Gen-Sets using funds acquired for that purpose from the federal government. If the evidence supporting those allegations is credited by a jury, it will establish that the United States was deprived of the benefit of its bargain when the Navy received destroyers containing Gen-Sets of lower quality than those for which the government had contracted and paid. The impact on the public fisc is indistinguishable from an effort by the general contractors themselves to supply substandard Gen-Sets, and there is no reason to treat the two situations differently simply because the subcontractors here allegedly duped both the prime contractors and the Navy. Petitioners' parsimonious reading of Section 3729(a)(2) and (3), under which liability for fraudulent conduct would turn on the nuances of the government's bookkeeping practices rather than on the ultimate impact of the fraud upon the United States, is unsupported by the statutory text and would disserve the broad remedial purposes of the FCA, which "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968) (*Neifert-White*).

A. Section 3729(a)(2) of Title 31 Does Not Require Proof That A False Claim Was "Presented" Directly To The Federal Government

Section 3729(a)(2) of Title 31 imposes FCA liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a

false or fraudulent claim paid or approved by the Government." 31 U.S.C. 3729(a)(2). Petitioners contend that, "for a claim to be 'paid or approved by the Government,' it first must be submitted to the government." Pet. Br. 13; see *id.* at 13-29. That argument lacks merit. Petitioners' alleged false claims were "paid * * * by" the United States because the United States was the source of the funds. Petitioners, moreover, received those funds through prime contractors for work performed under subcontracts in fulfillment of procurement contracts with the United States. Petitioners' alleged misconduct thus squarely implicates the FCA's core purpose of preventing fraud in procurement for the national defense.

1. Petitioners' alleged conduct falls squarely within the ordinary meaning of Section 3729(a)(2)

As a matter of ordinary English usage, a bill or other obligation would commonly be described as "paid by" the person whose money is used for payment, even if some other person performs the mechanical act of transferring the funds to their recipient. For example, "[w]hen a student says his college living expenses are 'paid by' his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses." *Totten*, 380 F.3d at 506 (Garland, J., dissenting). That use of the phrase "paid by" is particularly natural if the ultimate source of the funds directs that all or part of the money be used for a specifically defined purpose. Thus, if a man gives his daughter $100 and asks her to use a portion of the money to fill the family car with gasoline, the bill for the gas would readily be described as being "paid by" the

father, even though the daughter effects the physical transfer of funds to the service station operator.

To be sure, the verb "pay" and its variants can *sometimes* refer to the mechanics of disbursing funds rather than to the incidence of a transaction's ultimate financial impact. Thus, if a mother and son are watching television when a pizza delivery arrives, the mother might hand her son cash and ask him to go to the door to "pay for" the pizza. In that scenario, the son would "pay for" the pizza in the sense of handing money to the delivery person, while the mother would "pay for" the pizza in the sense of absorbing its cost.

It would be inconsistent with the tenor of this Court's FCA precedents, however, to infer that Congress in drafting Section 3729(a)(2) used the phrase "paid * * * by the Government" *solely* to describe the logistics of transferring funds, without reference to the ultimate economic consequences of a defendant's fraudulent conduct.[2] The Court in *Neifert-White* stated that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." 390 U.S. at 232. The Court further explained

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[2] Even as a matter of common parlance, the statement that a bill was "paid" by a particular person would typically be understood, unless the context clearly indicated that a different meaning was intended, to refer to the *source* of the relevant funds rather than to the mechanics of payment. A restaurant guest who helpfully takes his friend's money to the cashier in order to complete the transaction, and later claims to have "paid the check," can expect to acquire a reputation for ingratitude. Similarly, if a father tells his son, "You're paying for your own clothes from now on," and the son replies, "I'll be glad to do that as soon as you give me the money," the father is unlikely to regard the answer as constructive.

that, "[i]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." *Ibid.* With specific regard to the administration of federal funding programs by non-federal intermediaries, the Court in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) (*Marcus*), explained that funds provided to States under various aid programs "are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution." *Id.* at 544 (footnote omitted). Petitioners' contention that Section 3729(a)(2) should be construed by reference to the mechanics of fund distribution, rather than to the ultimate impact of their alleged fraudulent conduct, is at odds with the Court's established approach to the interpretation of the FCA.

In the instant case, the invoices that petitioners submitted for the Gen-Sets were "paid * * * by" the government. Although the payments that petitioners received under the subcontracts traveled through intermediaries, the federal government was the ultimate source of the funds. Those payments were made pursuant to government contracts that obligated the prime contractors to build destroyers containing Gen-Sets that conformed to precise contractual requirements. In order to discharge their own contractual obligations, the prime contractors were therefore required to use a portion of the funds that they received from the government either

to manufacture, or to acquire from another source, Gen-Sets meeting the Navy's specifications. The purpose of the overall undertaking, moreover, was to produce destroyers equipped with Gen-Sets for use by the Navy rather than by any private party. Thus, the funds that the prime contractors transmitted for production of the Gen-Sets were acquired from the government originally, and they were forwarded to the subcontractors to achieve a governmental objective. The court of appeals' conclusion that the subcontractors' claims were "paid * * * by" the United States therefore accords with ordinary English usage.

2. Petitioners' presentment theory cannot be squared with related statutory provisions

Under established principles of construction, any ambiguity in Section 3729(a)(2) standing alone should be resolved by considering that provision in light of its larger statutory context. As this Court has instructed, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Thus, "[i]n expounding a statute, [the Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) (quoting *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)). Petitioners' reading of Section 3729(a) is at odds with this Court's repeated admonitions that the FCA should be construed in a manner that ensures comprehensive protection against attempts to defraud the

United States. See pp. 10-11, *supra*; pp. 25-27, *infra*. More specifically, two other provisions within Section 3729 itself reinforce the conclusion that a subcontractor's claim may be "paid" by the United States within the meaning of Section 3729(a)(2) even if it is not directly presented to any federal official.

a. Petitioners' presentment theory is inconsistent with the FCA's definition of "claim"

As amended in 1986, the FCA contains the following definition of "claim":

> For purposes of [31 U.S.C. 3729], "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. 3729(c). The House Report accompanying the 1986 amendments explained that "claims or false statements made to a party other than the Government are covered by this term if payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 660, 99th Cong., 2d Sess. 21 (1986) (*1986 House Report*). The Senate Report accompanying the 1986 amendments similarly explained that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *1986 Senate Report* 10. The Senate Report thus made clear that the new definition of "claim" was intended to overrule certain cases "which

ha[d] limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." *Id.* at 22; see *id.* at 15 (similar); see generally *id.* at 21-22 (discussing cases).[3] Two related aspects of that definition are particularly relevant here.

First, in defining the term "claim" to include requests for payment submitted to federal "contractor[s],

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[3] As petitioners point out (Br. 26), the bill discussed in the Senate and House Reports did not contain the provision that ultimately added the phrase "by the Government" to 31 U.S.C. 3729(a)(2). That phrase first appeared in a substitute version of the House bill that was offered during debate in the House. See 132 Cong. Rec. 22,330 (1986) (H.R. 4827, 99th Cong., 2d Sess. § 2(3) (1986)); *id.* at 22,336 (statement of Rep. Glickman) (explaining principal differences in substitute bill but not mentioning this change); *id.* at 22,345 (statement of Rep. Glickman). There was no mention of this particular provision in the brief debate in the House or in the brief discussion that followed in the Senate. See *id.* at 28,580-28,581 (statements of Sens. Grassley, Hatch, and Thurmond). Because the definition of "claim" discussed in the Committee Reports was retained in the enacted law—and because there was no discussion of the insertion of the phrase "by the Government" in Section 3729(a)(2), much less any suggestion that it was intended to undo what Congress sought to accomplish with Section 3729(c)—there is no reason to doubt that the reports accurately reflect Congress's intent in adopting the new definition of "claim." Rather, the phrase "by the Government" should be construed in a manner that *harmonizes* Section 3729(a)(2) and (c). That is best accomplished by reading the phrase as simply conforming Section 3729(a)(2) to Section 3729(c), by confirming that a false claim submitted to a federal contractor or grantee is actionable only if it is potentially payable (either directly or ultimately) by the government, *i.e.*, "if payment thereon would ultimately result in a loss to the United States." *1986 House Report* 21; *1986 Senate Report* 10; see pp. 29-30, *infra*. Under this reading, an effort to defraud a grantee or contractor does not violate Section 3729(a)(2) unless it has the potential either to increase the amount of government funds expended or to diminish the quality of goods or services that the government ultimately receives.

grantee[s], or other recipient[s]," Congress presumably intended to accomplish something of substance. Petitioners read Section 3729(c) as simply "mak[ing] clear that a request for payment submitted to and paid by a federally funded private entity is not excluded from the scope of the FCA, if—as required by Section 3729(a)(2)—a claim is thereafter submitted to the government for reimbursement or approval." Pet. Br. 24. Congress's inclusive definition of the term "claim" would be superfluous, however, if liability under the various provisions of 31 U.S.C. 3729(a) ultimately depended on proof that some *other* request for payment was eventually presented to a federal officer or employee. Even if Section 3729(c) had not been added to the statute, the sequence of events hypothesized by petitioners, in which a fraudulent request for payment directed to a federal grantee leads the grantee to submit its own request for reimbursement to the federal government, would be covered by Section 3729(a)(1). See 31 U.S.C. 3729(a)(1) (imposing liability on any person who "knowingly presents, *or causes to be presented*, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval") (emphasis added). Petitioners' exegesis of Section 3729(c) thus gives no operative effect to Congress's determination that, under specified circumstances, a request for payment directed to a federal contractor or grantee should *itself* be treated as an FCA "claim."

Second, petitioners' construction of Section 3729(c) suffers from an additional, related flaw. Section 3729(c) states that a request for money or property submitted to a federal contractor, etc., will constitute a "claim" *either* "if the United States Government provides any portion of the money or property which is requested or de-

manded, *or* if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. 3729(c) (emphasis added). Congress's use of the disjunctive demonstrates that the circumstances in which the government "provides [a] portion of the money or property which is requested or demanded" are not limited to those in which the government will later "reimburse [the] contractor, grantee, or other recipient" for money that the contractor, etc., has already paid out. The most obvious circumstance in which the first condition will be satisfied even though the second is not is one in which a third party requests money or property that the government has *previously* provided to a contractor or grantee. Petitioners' construction of Section 3729(c), which accords operative effect to the definition of "claim" only when the contractor or grantee submits an after-the fact request for reimbursement, effectively negates Congress's determination that a request directed to a federal contractor, etc., will be treated as an FCA "claim" in either of two distinct circumstances.

The District of Columbia Circuit in *Totten* suggested that, because Section 3729(c) refers in the present tense to situations in which the federal government "provides any portion of the money or property which is requested or demanded," it does not literally encompass situations in which the government has *already* provided money to a contractor or grantee before that entity receives a request for payment from a third party. See 380 F.3d at 493. That analysis attaches greater weight to Congress's use of the present tense than the language of Section 3729(c) will reasonably bear. As a practical matter, the federal government will rarely if ever "provide[]" money to a contractor or grantee at precisely the

same time that the same money "is requested or demanded" *from* the contractor or grantee by a third party. Thus, even though the verbs "provides" and "is" are both in the present tense, Congress surely anticipated that the government's provision of funds and the third party's request or demand for them would occur at different times.

Because Section 3729(c)'s separate reference to situations in which the government "will reimburse [the] contractor, grantee, or other recipient" encompasses situations in which the government furnishes money *after* the contractor or grantee has paid the third party, the first "if" clause is naturally construed to cover instances in which the government's provision of funds occurs *before* the third-party request (and, but certainly not only, in the rare instance described above of simultaneous payment and request). The word "provides" in the first "if" clause in Section 3729(c) may also be intended to capture situations in which the United States provides (or has an arrangement to provide) money to the contractor or grantee on an ongoing or as-needed basis or in a series of progress payments that supply the funds out of which the claim is to be paid. That interpretation of Section 3729(c) would cover this case as well.

b. Petitioners' contention that Section 3729(a)(2) imposes an implicit presentment requirement is inconsistent with Section 3729(a)(1)

The core of petitioners' argument is that a requirement of presentment to the United States is *implicit* in Section 3729(a)(2)'s requirement that the relevant false claim be "paid or approved by the Government." In addition to the fact that petitioners' construction of Section 3729(a)(2) does not accord with common usage and de-

prives Section 3729(c) of operative effect, petitioners' reading is further undermined by Section 3729(a)(1), which *expressly* requires proof that a false or fraudulent claim was "presented" to a federal officer or employee. "When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see *Russello*, 464 U.S. at 23 ("We refrain from concluding * * * that the differing language in two subsections has the same meaning in each."). Because Congress explicitly required proof of presentment under Section 3729(a)(1), but declined to do so in the subsection that immediately follows, the Court should not lightly find the same requirement to be implicit in Section 3729(a)(2)'s significantly different language.

Petitioners contend (Br. 25-26) that, under the court of appeals' construction of the relevant provisions, all conduct covered by Section 3729(a)(1) will be covered by Section 3729(a)(2) as well, thereby "effectively render[ing] Section 3729(a)(1) dead letter." That is incorrect. Although Section 3729(a)(1) requires presentment of a false claim to the government and Section 3729(a)(2) does not, Section 3729(a)(2) requires use of a "false record or statement." Under Section 3729(a)(1), by contrast, a claim may be "false or fraudulent" if it requests federal funds to which the claimant is not entitled, even if the claim does not contain any express representation that is false. A person who knowingly presents such a claim to a federal officer or employee therefore may incur liability under Section 3729(a)(1), even though he does not use any "false record or statement"

and therefore avoids any violation of Section 3729(a)(2).[4] Adding a presentment requirement to Section 3729(a)(2) is thus unnecessary to ensure that each of the two statutory subsections covers some conduct that the other does not.[5]

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[4] In a series of so-called "implied certification" cases, courts of appeals have held that the act of tendering an invoice for payment under a federal program constitutes an implicit representation that the claimant is entitled to the requested funds. The courts have further held that, if the defendant is aware that he is not entitled to the money (*i.e.*, that the implicit representation is false), he may be held liable under Section 3729(a)(1) for knowingly presenting a "false or fraudulent" claim. See, *e.g.*, *United States ex rel. Augustine* v. *Century Health Servs., Inc.*, 289 F.3d 409, 413-416 (6th Cir. 2002); *United States ex rel. Siewick* v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1374-1376 (D.C. Cir. 2000); *Shaw* v. *AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531-532 (10th Cir. 2000). But see *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999) (reserving the question whether FCA liability can be premised on "implied certifications"). The Tenth Circuit has further explained that, when FCA liability is premised on a false "implied certification," a defendant may be liable under Section 3729(a)(1) even though his conduct does not violate Section 3729(a)(2). See *Shaw*, 213 F.3d at 531-532.

[5] The court of appeals concluded that Section 3729(a)(2), unlike Section 3729(a)(1), "contains its own more burdensome requirement—the claim must actually have been paid." Pet. App. 12a. As petitioners explain (Br. 24-25), that holding is erroneous. Section 3729(a)(2)'s reference to the use of false records or statements "to get a false or fraudulent claim paid or approved by the Government" encompasses all cases where false records or statements are used for the *purpose* of eliciting payment. As with other FCA provisions, a defendant's liability under Section 3729(a)(2) does not depend on whether his misconduct achieves the desired result. Compare, *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 & n.5 (1956); *United States* v. *Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

Far from providing a basis for reversing the Sixth Circuit's judgment, however, the recognition that Section 3729(a)(2) does not require actual payment suggests that the evidence in this case was sufficient to go to

3. *Petitioners' reliance on current Section 3729(a)(2)'s statutory antecedents is misplaced*

As petitioners explain, the original FCA imposed liability on any person

> *who shall make or cause to be made*, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, *any claim upon or against the Government of the United States*, * * * knowing such claim to be false, fictitious, or fraudulent; * * * [or] who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry.

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the jury even under petitioners' proposed construction of Section 3729(a)(2). If petitioners' alleged misrepresentations as to the Gen-Sets' quality had gone undetected, the natural consequence of those false statements was that the prime contractors would (unknowingly) submit false claims to the Navy, and that the Navy would pay those claims. And because petitioners' alleged fraudulent scheme would have unraveled if the Navy had discovered the defects in the Gen-Sets and refused to pay the prime contractors, the jury could fairly have inferred that petitioners *intended* to set in motion a chain of events culminating in payment by the government. Although the evidence introduced at trial did not describe in any detail the process by which government payments were actually elicited, it provided a sound basis for inferring that petitioners acted with the *purpose* of getting the claims paid. Under petitioners' own construction of Section 3729(a)(2), the evidence was therefore sufficient to create a jury question as to petitioners' liability under that Section.

False Claims Act, ch. 67, § 1, 12 Stat. 696-697 (emphasis added).

Although petitioners assert (Br. 21) that the provision quoted above "unambiguously required the submission of a claim to the government," that assertion reflects a misreading of the FCA's original text. Rather, as the italicized language quoted above makes clear, the original FCA imposed liability upon any person who "ma[d]e or cause[d] to be made" a false claim "upon or against the Government of the United States." The "mak[ing]" of a false claim "upon or against" the federal government, moreover, was expressly identified as a ground for liability separate and distinct from the "present[ment]" of such a claim to a United States government official. Thus, the statute's further prohibition of the use of a false bill, etc., to obtain "the approval or payment of such claim," is properly understood to refer to a false claim "upon or against" the federal government that was *either* "ma[d]e or cause[d] to be made" *or* "presented" to a federal official. Although the original FCA did not define the circumstances under which a covered false claim could be "made" upon or against the United States without being "presented" directly to a federal officer, that version of the statute clearly did not require presentment in all circumstances.

In enacting the 1986 FCA amendments, including the new definition of "claim" contained in Section 3729(c), Congress did not perceive pre-existing law to make presentment of a claim to the United States an invariable requirement for liability under the Act. Rather, the *1986 Senate Report* discussed competing lines of judicial decisions applying the FCA to various federal grant programs, and it described new Section 3729(c) (Section 3729(d) in the version of the bill discussed in the report)

as "clarif[ying]" rather than changing the applicable law. *1986 Senate Report* 21; see *id.* at 21-22; *Totten*, 380 F.3d at 508 (Garland, J., dissenting).

B. The Court of Appeals Correctly Held That Respondents' Conspiracy Claims Under 31 U.S.C. 3729(a)(3) Should Have Been Allowed to Go To The Jury

Section 3729(a)(3) of Title 31 imposes liability upon any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Petitioners contend (Br. 29-32) that the evidence presented at trial was insufficient to support a verdict for respondents under Section 3729(a)(3) because that evidence did not show a conspiracy to submit false claims *to the government*. That argument lacks merit.

1. Petitioners contend (Br. 30) that because Section 3729(a)(3) refers specifically to conspiracies to defraud "the Government," the statutory text "clearly and unambiguously requires proof that the defendant participated in a conspiracy to submit a false claim to the government itself." That contention is incorrect because the facts of the instant case fall squarely within the text of Section 3729(a)(3). Respondents alleged, and presented evidence sufficient to go to the jury, that petitioners submitted claims for payment while knowingly concealing defects in Gen-Sets that were manufactured for installation on Navy destroyers. Although petitioners submitted those claims to the government contractors responsible for the general contract rather than directly to federal contracting officials themselves, it was an essential feature of the alleged fraudulent scheme that the Navy be kept unaware of the defects in equipment for which the United States had contracted and paid. If proved to a jury's satisfaction, those allegations would establish both that

petitioners "conspire[d] to defraud the Government" and that they agreed to achieve the desired objective "by getting a false or fraudulent claim allowed or paid." The text of Section 3729(a)(3) requires no more than that.

Petitioners' reliance (see Br. 15-16, 31) on *Tanner* v. *United States*, 483 U.S. 107 (1987), is misplaced. The Court in *Tanner* construed 18 U.S.C. 371, which makes it a federal crime to "conspire either to commit any offense against the United States, or to defraud the United States." See 483 U.S. at 128. The Court *agreed* with the government that "under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud." *Id.* at 129. The Court further agreed that "[a] method that makes use[] of innocent individuals or businesses to reach and defraud the United States is not for that reason beyond the scope of § 371." *Ibid.* The government also argued, however, that because a particular private corporation received money from the United States and functioned as an intermediary in the performance of federal functions, an agreement to defraud the corporation was itself a conspiracy "to defraud the United States" within the meaning of Section 371. *Id.* at 130. The Court rejected that contention, explaining that coverage of frauds directed against a private corporation had "not even an arguable basis in the plain language of § 371." *Id.* at 131.

In the instant case, respondents' conspiracy allegations are premised on the theory that the Court in *Tanner* accepted, not the theory it found wanting. Respondents do not contend that either of the prime contractors or any other private actor *is* "the Government" within the meaning of 31 U.S.C. 3729(a)(3), or that a conspiracy to defraud such private entities is itself covered by the FCA. Rather, respondents alleged, and have presented

evidence sufficient to sustain a jury verdict, that petitioners submitted false claims to private actors *as a means of defrauding the United States*.

2. Relying in part on *Beck* v. *Prupis*, 529 U.S. 494, 505-506 (2000), petitioners argue (Br. 29-30) that presentment of a false claim to the federal government is essential to liability under 31 U.S.C. 3729(a)(1) and (2); that Section 3729(a)(3) is limited to conspiracies to perform acts that would themselves violate Section 3729(a)(1) or (2); and that Section 3729(a)(3) therefore requires an agreement to present false claims to a federal official. As we explain above (see pp. 8-22, *supra*), the initial premise of petitioners' argument is incorrect, since Section 3729(a)(2) requires *payment or approval by*, not *presentment to*, the United States. Moreover, petitioners' approach would make little practical sense. From the standpoint of protecting the public fisc, there is little difference between a conspiracy to defraud the government by keeping both the general contractors and the Navy in the dark, and a conspiracy to defraud the Navy that included the general contractors. But under petitioners' theory, only the latter would involve an agreement to present false claims to federal officials, and thus only the latter would be covered.

Petitioners' reliance on *Beck* also ignores critical textual differences between Section 3729(a)(3) and the RICO provision at issue in that case. *Beck* involved the civil conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which makes it unlawful "to conspire to violate any of the provisions of subsection (a), (b), or (c) of [Section 1962]." 18 U.S.C. 1962(d); see *Beck*, 529 U.S. at 497. Because Section 1962(d) by its terms requires a conspiracy "to violate" another provision of RICO, it is naturally

construed to require an agreement to commit a substantive RICO violation. By contrast, 31 U.S.C. 3729(a)(3) does not speak of an agreement to "violate" another provision of the FCA.

The Court in *Beck* observed that, "[b]y the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious." 529 U.S. at 501. The text of the RICO civil-conspiracy provision does not suggest an intent to depart from that background rule, nor does it specify the *type* of tortious act that will give rise to civil liability. In concluding that a RICO civil-conspiracy plaintiff must show injury from "an act that is independently wrongful under RICO," *id.* at 505-506, the Court thus drew on established background principles in the absence of more direct evidence of congressional intent. Section 3729(a)(3), by contrast, *does* specify the proscribed means of "defraud[ing] the Government"—*viz.*, "by getting a false or fraudulent claim allowed or paid." There is consequently no need to examine common-law principles to determine what tortious acts a person must agree to perform in order to be subject to liability under Section 3729(a)(3).

C. A Categorical Requirement That A False Claim Be Presented To The Government Would Disserve The Purposes Of The FCA

1. Under petitioners' theory, FCA liability for deceptive efforts to obtain federal money in the hands of a contractor or grantee would turn fortuitously on the *timing* of the wrongdoer's fraudulent acts and on the particular payment and bookkeeping mechanisms that the federal government employs to fund and monitor the expenditures of its contractors and grantees. Suppose, for exam-

ple, that the federal government provides a block grant to a state agency for distribution to defined categories of economically disadvantaged persons, and that an individual fraudulently obtains funds from the state agency by misrepresenting his qualifications for payment. That sort of fraudulent diversion of federal money from its intended purpose squarely implicates the concerns of the FCA. See *Marcus*, 317 U.S. at 544 (explaining that funds provided as grants in aid to States "are as much in need of protection from fraudulent claims as any other federal money"); *1986 Senate Report* 10 (explaining that "a false claim * * * to a State under a program financed in part by the United States, is a false claim to the United States"). The request for payment submitted to the state agency, moreover, would fall squarely within the definition of "claim" contained in 31 U.S.C. 3729(c). See pp. 13-17, *supra*.

Petitioners contend that this is insufficient, and that the government (or a private relator) in this scenario must show in addition that a false claim was presented directly to the United States. Under the circumstances described above, the plaintiff in an FCA action could presumably identify a "claim" for payment presented to the federal government—*i.e.*, a request for federal funds submitted by the state agency under the relevant grant program. That claim would not be "false or fraudulent" (31 U.S.C. 3729(a)(1)), however, if it was submitted before the defendant's deceptive conduct occurred. Nor could the defendant in that scenario, who acted after the state agency had received the federal funds, plausibly be said to "cause[]" (*ibid.*) the state agency's claim to be presented. Under petitioners' theory, the defendant could therefore escape FCA liability simply by committing his fraud *after* the state agency had presented its

own claim to the federal government. See *Totten*, 380 F.3d at 515 (Garland, J., dissenting).[6]

In many federal grant programs, the United States receives after-the-fact reports or performs after-the-fact audits that examine the manner in which federal funds have been spent during particular periods of time. Such procedures may trigger a reconciliation or adjustment of the final amounts the grantee may retain. See, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-415 (1993); *Bowen* v. *Massachusetts*, 487 U.S. 879, 883-884 (1988). Depending on the circumstances, such reports—or documents submitted by a grantee to the government in connection with such audits—might be treated as "false or fraudulent claim[s] for payment or approval," 31 U.S.C. 3729(a)(1), or as "false record[s] or statement[s] to conceal, avoid, or decrease an obligation to pay or transmit money to the Government," 31 U.S.C. 3729(a)(7). A person who fraudulently obtained money from the grantee might be held liable under the FCA on the theory that he "cause[d]" those false documents to be submitted. Construing Section 3729(a)(1) and/or (7) to cover documents submitted during such audits or similar reconciliation processes would mitigate the practical impact of petitioners' proposed construction of Section 3729(a)(2) and (3).

In scenarios like the one described above, however, the essence of the defendant's wrongful conduct is the

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[6] As noted, attaching dispositive significance to this fortuity cannot be squared with Section 3729(c), which expressly covers *both* the reimbursement scenario, in which the intermediary's request for payment follows the fraudulent claim to the intermediary, *and* the scenario in which the grantee receives payment before fraudulent claims are made to the intermediary and federal funds are disbursed downstream.

use of fraudulent means to attempt to divert federal funds to other than their intended purpose in the first place. That wrongdoing is complete when the defendant submits his fraudulent request for payment to the state agency or similar grantee. The defendant's FCA liability should not depend on the fortuity (so far as the defendant is concerned) that a later federal audit or final report is or is not performed or submitted, or on whether the specific documents prepared in connection with that subsequent undertaking are held to fall within the terms of Section 3729(a)(1) or (7). See *Marcus*, 317 U.S. at 544 (explaining that, under the FCA, the extent of protection afforded to federal grant-in-aid monies is not "dependent upon the bookkeeping devices used for their distribution").[7]

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[7] In the instant case, the contracts between the Navy and the prime contractors for production of the destroyers did not provide for full payment by the Navy in advance, but instead established a milestone payment schedule under which the prime contractor received periodic payments based on the extent of its progress towards completion of the ships. See C.A. App. 410-414. Although the prime contractors' invoices to the government were not introduced at trial, it therefore seems likely that some of those invoices were submitted *after* petitioners' alleged fraudulent claims for payment for the Gen-Sets. To the extent that the prime contractors' invoices included charges attributable to the acquisition and installation of Gen-Sets, those invoices (assuming the accuracy of respondents' allegations that the Gen-Sets did not conform to contractual requirements) would have constituted "false or fraudulent claim[s] for payment or approval" within the meaning of Section 3729(a)(1). Thus, even accepting petitioners' proposed interpretation of Section 3729(a)(2) and (3), respondents might have introduced the prime contractors' invoices into evidence, and might have argued that petitioners were liable under Section 3729(a)(1) for "caus[ing]" those false claims "to be presented" to federal officials. Introduction of the prime contractors' invoices, however, would have complicated for the jury what was already an arcane and difficult case, and it would have

2. Petitioners contend (Br. 32-36) that, if presentment of a false claim to the federal government is not a prerequisite to liability under Section 3729(a)(2) and (3), the FCA will encompass *all* acts of fraud directed at any entity that receives money from the United States, including acts that pose no realistic danger of injury to the federal government. That is incorrect. Engrafting a presentment requirement onto Section 3729(a)(2) and (3) is unnecessary to ensure that the FCA continues to function as a tool for combating fraud *against the United States*.

a. The FCA defines the term "claim" to include, under specified circumstances, a "request or demand * * * for money or property which is made to a [federal] contractor, grantee, or other recipient." 31 U.S.C. 3729(c). That language is properly read to refer to payment requests submitted to a federal contractor, etc., *in its capacity as such*. Thus, if a particular contractor performs work both for the federal government and for private customers, a subcontractor's request for payment on a private customer's project would not be a "claim" within the meaning of Section 3729(c) because it would not be submitted to the prime contractor in its role as a federal contractor. For similar reasons, the request (if satisfied) would not be "paid or approved by the Government" within the meaning of Section 3729(a)(2).

That approach accords with the unquestioned understanding that the FCA is inapplicable to frauds directed

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detracted from a proper focus on the alleged wrongful conduct *of the defendants*. Cf. *United States* v. *Bornstein*, 423 U.S. 303, 313 (1976) (explaining that, in computing the civil penalties to be imposed under the FCA, "the focus in each case [should] be upon the specific conduct of the person from whom the Government seeks to collect the statutory [penalties]").

against individual federal employees. No FCA violation occurs if a federal employee, acting outside the scope of his federal duties, is the victim of a stock swindle or dishonest used-car salesman, even if the employee uses his federal salary to pay the fraudulent request. Although the employee is literally a "recipient" of federal funds (see 31 U.S.C. 3729(c)), the request for payment in that scenario is not an FCA "claim" because it is not submitted to the employee in his federal role. And for purposes of Section 3729(a)(1), the request for payment is not "present[ed] * * * to an officer or employee of the United States Government" because it is not presented to the federal employee in his capacity as such. Application of similar principles to efforts to deceive federal contractors will prevent the unwarranted extension of FCA liability to schemes that pose no meaningful danger of harm to the federal government, while ensuring that the statute encompasses sophisticated as well as more direct efforts to defraud the United States.[8]

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[8] Petitioners contend (Br. 35) that the Sixth Circuit's decision "creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies." That concern is considerably overstated. Although an FCA defendant is potentially liable for "3 times the amount of damages which *the Government* sustains," 31 U.S.C. 3729(a) (emphasis added), injury to a private contractor is not itself remediable under the Act, even if the defendant's liability arises from its misstatements to the contractor. Contrary to petitioners' suggestion (Br. 35-36), moreover, the determination whether a particular request was "paid * * * by the Government" within the meaning of Section 3729(a)(2) does not turn, under our theory, on tracing the specific dollars used to pay the claim. Rather, the pertinent question is whether the contractor or grantee, in making the payment, was acting in furtherance of its responsibilities under the relevant federal program and receiving funds from the government to do so.

b. Addition of a presentment requirement is even more clearly unnecessary to prevent undue expansion of liability under Section 3729(a)(3). That provision covers conspiracies "*to defraud the Government* by getting a false or fraudulent claim allowed or paid." 31 U.S.C. 3729(a)(3) (emphasis added). Because the italicized language confines Section 3729(a)(3)'s reach to conspiracies that endanger the federal fisc, there is no reason to engraft an atextual presentment requirement to achieve the same result.

c. Petitioners further contend (Br. 19 n.6) that, "[i]n cases where a false claim has never been submitted to the federal government for payment or approval, * * * it is doubtful whether the government itself has been injured by a defendant's alleged fraud." The facts alleged in this case convincingly refute that assertion. If (as respondents allege) petitioners knowingly concealed defects in Gen-Sets that cost $3 million each, to be installed on Navy destroyers priced at $1 billion apiece, the federal government was self-evidently injured by petitioners' fraud. The absence from the record of the prime contractors' invoices to the Navy does not call that obvious conclusion into doubt.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys

JANUARY 2008

AMICUS CURIAE BRIEF

82 58304 D (4)
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No. 07-214

FILED
JAN 2 1 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
ROGER L. SANDERS AND ROGER L. THACKER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR MARSHA FARMER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JAMES W. MCCARTNEY
1001 Fannin, Suite 3122
Houston, Texas 77002
Telephone (713) 758-2324
Facsimile (713) 654-7869

BRANTLY HARRIS
808 Travis Street, Suite 1424
Houston, Texas 77002
Telephone (713) 222-0964
Facsimile (713) 222-1545
Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

ARGUMENT 5

I. THE MAIN PURPOSE OF THE FALSE CLAIMS ACT WAS TO STOP FRAUDULENT ACTIVITIES 5

II. THE SURVIVING CIVIL PROVISIONS ARE IN THE ALTERNATIVE 6

III. JUDICIALLY INSERTING A PRESENTMENT REQUIREMENT INTO 31 U.S.C. §3729(a)(2) WOULD CAUSE OBSTACLES NOT INTENDED BY CONGRESS 7

CONCLUSION 13

APPENDIX A:

False Claims Act of March 2, 1863, ch. 67, 12 Stat. 696 (1863) ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

United States ex rel. Magid v. *Wilderman*, 2004 U.S. Dist. LEXIS 8459 and 17494 (E.D. Pa. 2004) 9

United States ex rel. Marcus v. *Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943) 12

United States of America ex rel. El Amin v. *The George Washington University*, 2007 U.S. Dist. LEXIS 85327 (D.C. 11/27/07) 8, 11

United States of America ex rel. Marsha Farmer v. *City of Houston et al.*, 2006 U.S. Dist. LEXIS 84154 (So. Dist. Tex. 2006) 4

United States of America ex rel. Marsha Farmer v. *City of Houston; Houston Area Urban League*, Case No. 06-20740, *United States Court of Appeals for the Fifth Circuit* 4, 12

United States of America ex rel. Totten v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032 ..... 1, 4, 8

United States of America, et al. v. *City of Houston and Houston Area Urban League*, 2005 U.S. Dist. LEXIS 18387 4

United States of America, et al. v. *City of Houston, et al.*, U.S. Dist. LEXIS 57741 (So. Dist. Tex. 2006) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. *McNinch*, 356 U.S. 595, 78 S.Ct. 950 (1958) 12

United States v. *Neifert-White Company*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) 12

STATUTES AND RULES

31 U.S.C. §3729 1

31 U.S.C. §3729(a)(1) 1, 6

31 U.S.C. §3729(a)(2) 2, 6, 7, 11

31 U.S.C. §3729(a)(3) 2, 6

31 U.S.C. §3729(a)(7) 2, 6

31 U.S.C. §3729(c)(5) 11

31 C.F.R. §210.3 *et seq.* 9

The U.S. Treasury Financial Manual, Part 6-2040.10 9

INTEREST OF *AMICUS CURIAE*[1]

Your *amicus curiae*, Marsha Farmer, is the relator in an action under the False Claims Act against the City of Houston and Houston Area Urban League for overcharges in connection with the City's federally funded Emergency Home Repair Program. A summary judgment having been entered against her based upon *United States of America ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032 she has appealed to the Court of Appeals for the Fifth Circuit, where oral argument was held on August 8, 2007.

STATUTORY PROVISIONS INVOLVED

31 U.S.C. §3729. False claims

(a) Liability for Certain Acts. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a

[1] The parties have consented to the filing of this brief, as reflected by letters filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement ***to get a false or fraudulent claim*** paid or ***approved*** by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * *

(6) . . . ***or***

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government . . .".

(b) Knowing and Knowingly Defined. For the purpose of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts with deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no poof of specific intent to defraud required.

(c) Claim Defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a *contractor, grantee, or*

> *other recipient* if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.
>
> (Emphasis supplied.)

STATEMENT

Marsha Farmer sued the City of Houston and Houston Area Urban League under the False Claims Act for false claims submitted for work done and materials supplied under the City of Houston's Emergency Home Repair Program, which was funded by the Department of Housing and Urban Development (HUD) under a federal block grant. *United States of America ex rel. Marsha Farmer* v. *City of Houston, et al.*, Civil Action No. H-03-3713, in the District Court for the Southern District of Texas, Houston Division. In her amended complaint she specified seventy-two instances of improper charges by the City of Houston and its subrecipient, Houston Area Urban League (one of four subrecipients). More than six thousand houses were repaired under the Program. Her action was filed on September 12, 2003. The government did not intervene. As the result of her disclosures the Department of Housing and Urban Development shut

down the entire Program[2] and began administrative proceedings to correct the many abuses which had occurred, using new personnel and the City of Houston's non-federal funds. These are ongoing.

However, eleven months after the *qui tam* action was filed the Court of Appeals for the District of Columbia decided *United States of America ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032 announcing that 31 U.S.C. §3729(a)(2) included a presentment requirement. Based upon *Totten* the district court entered summary judgment against relator dismissing the *qui tam* action with prejudice.[3] She appealed to the United States Court of Appeals for the Fifth Circuit, *United States ex rel. Marsha Farmer* v. *City of Houston; Houston Area Urban League*, Case No. 06-20740, which heard oral argument on August 8, 2007; the case is now under submission. (The Government filed

---

[2] Following dismissal of the qui tam case, defendants sought to rule relator for costs. The Court declined to do so stating, "Finally, even though Ms. Farmer's legal claims failed, the litigation was productive in that it led to the City's Emergency Home Repair Program being shut down by HUD." *United States of America ex rel. Marsha Farmer* v. *City of Houston et al.*, 2006 U.S. Dist. LEXIS 84154 (So. Dist. Tex. 2006).

[3] The district court had originally declined to dismiss the case, *United States of America, et al.* v. *City of Houston and Houston Area Urban League*, 2005 U.S. Dist. LEXIS 18387 (So. Dist. Tex. 2005), but the *Totten* case caused the district court to dismiss it, *United States of America, et al.* v. *City of Houston, et al.*, U.S. Dist. LEXIS 57741 (So. Dist. Tex. 2006).

an *amicus curiae* brief on her behalf in the Court of Appeals.)

The contract between the City of Houston and the Houston Area Urban League provided that all records were subject to audit by the federal Government.

ARGUMENT

I. THE MAIN PURPOSE OF THE FALSE CLAIMS ACT WAS TO STOP FRAUDULENT ACTIVITIES.

The False Claims Act[4] was enacted under Draconian circumstances on March 2, 1863 – two months before the battle of Gettysburg (July 1, 1863). It was emergency legislation. The survival of the Union was in doubt.

The Act made it clear that simply presenting a false claim was a crime, regardless of whether it was paid. Liability was automatic: the attempt, which consisted of presenting the claim, was the crime. Congress wanted to streamline the war effort by doing away with the administrative headaches involved in verifying claims. In addition, in case that warning not to file false claims was ignored, the Act provided that using false documents to get federal funds was a crime and punitive damages were recoverable. Using

[4] Appendix A.

false documents to get "approval" of a false claim, i.e., to deceive federal auditors, was a crime, and it was a crime to conceal a debt owing to the Government.

II. THE SURVIVING CIVIL PROVISIONS ARE IN THE ALTERNATIVE.

The surviving civil statutory provisions which are descendants from the False Claims Act are by their terms alternative:

1. Attempting to misappropriate funds by presenting a claim: 31 U.S.C. §3729(a)(1);
2. Using false documents to misappropriate funds: 31 U.S.C. §3729(a)(2);
3. Using false documents to deceive federal auditors, i. e., to get "***approval***": 31 U.S.C. §3729(a)(2);
4. Using false documents to conceal obligations to the Government: 31 U.S.C. §3729(a)(7);
5. Conspiracies: 31 U.S.C. §3729(a)(3).

However, *Totten*, based upon an analysis of the legislative history of the present provisions of the Act and the "provenance" of §3729(a)(1) and §3729(a)(2) held that the two sections should be construed together so that presentment was an element of a cause of action under §3729(a)(2). In fact using false documents, including false invoices, to misappropriate federal funds and using false documents to deceive federal auditors later on when disbursements are

systematically reviewed, such as false business entries to support the false invoices which were previously paid, are separate violations of the Act which occur at different times and which should be separately actionable under the plain language of the Act.

III. JUDICIALLY INSERTING A PRESENTMENT REQUIREMENT INTO 31 U.S.C. §3729(a)(2) WOULD CAUSE OBSTACLES NOT INTENDED BY CONGRESS.

The question before this Court and the Fifth Circuit Court of Appeals is whether a relator who can show widespread overcharges paid with federal funds must go further and, in effect, locate the headwaters of the Nile by tracing the payments all the way back to the Government. In your *amicus curiae's* action involving repairs to more than six thousand houses the burden of showing every single presentment from which the payments resulted would be burdensome. Many of the presentments may not be capable of being located. Many of the misrepresentations may have occurred later on, to deceive the auditors. There is no sound policy reason why all of these wrongful activities must be tied to presentments to the Government. Petitioners argue that there is a danger that people who merely intended to cheat universities or other recipients may unwittingly be exposed to the so-called Draconian remedies prescribed in the Act, but that is hardly the case: these so-called innocent crooks can persuasively argue that they did not

"knowingly" cheat the Government, that they only intended to cheat someone else and that they resembled bona fide purchasers for value without notice.

The problem of showing presentment was presented to a district court in the District of Columbia in *United States of America ex rel. El Amin* v. *The George Washington University*, 2007 U.S. Dist. LEXIS 85327 (D.C. 11/27/07), a case squarely governed by *United States of America ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032. The case involved Medicare fraud. Relators spent ten years in discovery and performed a manual search in the Federal Records Center of millions of pages of documents, but were only able to come up with two hundred twenty three hard copy claim forms of which only fifty related to the anesthesiologists identified in the complaint. Defendants sought summary judgment with respect to any claims besides those identified in the fifty claim forms. The court denied the motion, stating:

> "While it is evident that the FCA requires Relators to prove the existence of 'a false or fraudulent claim' nothing in the FCA requires Relators to possess (and present to the factfinder) the actual claim form, whether it be paper or electronic, submitted to the government."

The court noted that some HCFA claim forms were submitted electronically and others were submitted

in hard copy format, observing that "neither Defendant nor Relators seem to know when Defendant submitted claims electronically and when it submitted them in hard copy format."

The court concluded, "Based on the effort Relators undertook to locate the HCFA claim forms, and the reliability of secondary evidence in their possession, the Court concludes that the best evidence rule does not bar secondary evidence of Medicare claims." The court relied on *United States ex rel. Magid* v. *Wilderman,* 2004 U.S. Dist. LEXIS 8459 and 17494 (E.D. Pa. 2004), another Medicare case in which the plaintiff could not come up with HCFA-1500 claim forms but used other evidence including EOMB forms which showed the amounts Medicare reimbursed defendant for the claims to show that invoices had been inflated. Defendant alleged that there could have been errors in transmitting data from the HCFA-1500 claim forms into the Medicare computer system so that the EOMB forms would not accurately reflect the claims submitted, but the court said that was an issue for the factfinder, so that summary judgment was not justified.

In the City of Houston's Emergency Home Repair Program letters of credit were used. As a matter of regulatory procedure disbursements would not be made without the use of electronic drawdown vouchers prescribed by the U.S. Treasury Financial Manual Part 6-2040.10, promulgated pursuant to 31 C.F.R. §210.3 *et seq.*, which provides:

> The recipient organization will submit a properly completed payment voucher to the commercial bank for transmission to the appropriate Federal Reserve bank or branch as funds are required for immediate disbursement needs. At the time, the commercial bank may credit the account of the recipient organization with the amount of funds being drawn down if agreed to by the bank and the recipient organization.
>
> The Federal Reserve will review the payment voucher for completeness and correctness, verifying the letter-of-credit number, agency location code (ALC, which was formerly referred to as the eight digit agency station symbol), signatures, and that the amount requested is within the available balance of the letter of credit.
>
> The Federal Reserve bank or branch credits the reserve account of the commercial bank, advises the commercial bank of acceptance of the payment voucher, and charges the account of the U.S. Treasury.

And in Section 2025.10 it is provided:

> All disbursements, whether in cash, or by checks or electronic payments drawn on the U.S. Treasury or designated depository banks, for authorized and lawful payments and/or refunds of amounts collected, shall be supported with sufficient information on the disbursement vouchers, or on documents attached to them, to enable the audit of the

> transactions of certifying and disbursing officers, as required by law.

Does Congress intend that your *amicus curiae* in her case be required to come up with direct evidence of presentment of every claim which resulted in payments for repairs to over six thousand houses, even though it is undisputed that the entire Program was financed with federal funds? Are plaintiffs in False Claims Act cases required to master the labyrinthine details of regulatory procedures by which federal funds are disbursed? Relator did discover on her own numerous false invoices paid with federal funds which included overcharges for materials and labor, and her discovery caused HUD to shut down the Emergency Home Repair Program. Extensive discovery was underway when her action was dismissed. One thing is certain: federal funds payable under a letter of credit do not just walk out of the door. (Ultimately, if her case goes to trial, she will be able to rely on factual findings by HUD in its ongoing administrative proceeding, 31 U.S.C. §3729(c)(5).)

In the *El-Amin* case, discussed above, the result of the court's decision was to leave the case on the docket for trial on the merits. That leaves open the question before *this* Court in the case at bar: when that trial occurs must the relator obtain a favorable answer to the question whether the claims were presented? A literal minded jury may find that only fifty claims were proved. This Court should hold that presentment is not an issue in a case brought under 31 U.S.C. §3729(a)(2). Every false invoice and every

false supporting document subsequently contrived to support such invoice will be separately actionable, as they should be. Such a holding should result in affirmance in the case at bar, and such a holding would also simplify the Fifth Circuit's disposition of *United States of America ex rel. Marsha Farmer* v. *City of Houston and Houston Area Urban League,* Case No. 06-20740, in the United States Court of Appeals for the Fifth Circuit. Such a holding will carry into effect the Congressional policy that the Act should be broadly construed. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544-45, 63 S.Ct. 379, 87 L.Ed. 443 (1943); *United States* v. *McNinch*, 356 U.S. 595, 599 (1958); *United States* v. *Neifert-White Company*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968).

Many of the overcharges alleged in your *amicus curiae's* qui tam action involved repairs which took place following Houston's Tropical Storm Allison in 2001. Her action is probably a small preview of cases which will arise from Hurricane Katrina, which will also raise the question whether plaintiffs in False Claims Act cases must prove presentment in addition to showing that federal funds were wrongfully appropriated by companies doing repair work after that monumental disaster.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JAMES W. MCCARTNEY
1001 Fannin, Suite 3122
Houston, Texas 77002
Telephone (713) 758-2324
Facsimile (713) 654-7869
Of Counsel for Marsha Farmer, Amicus Curiae

BRANTLY HARRIS
808 Travis Street, Suite 1424
Houston, Texas 77002
Telephone (713) 222-0964
Facsimile (713) 222-1545
Counsel of Record for Marsha Farmer, Amicus Curiae

APPENDIX A: The False Claims Act (Original), Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863)

March 2, 1863. CHAP. *LXVIL-An Act to prevent and punish Frauds upon the Government of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, or cause to be made or statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who, for

the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and wilfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or wilfully to

conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipment, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offence, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

SEC. 2. *And be it further enacted,* That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

SEC. 3. *And be it further enacted,* That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

SEC. 4. *And be it further enacted,* That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases,

the several district courts of the Territories of the United States within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 5. *And be it further enacted,* That it shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 6. *And be it further enacted,* That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount

of such forfeiture, as well as one half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

SEC. 7. *And be it further enacted,* That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.

SEC. 8. *And be it further enacted,* That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such officer, agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

SEC. 9. *And be it further enacted,* That all acts and parts of acts inconsistent with or repugnant to any of

the provisions of this act are hereby repealed, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages have been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract. APPROVED, March 2, 1863.

AMICUS CURIAE BRIEF

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No. 07-214

FILED

JAN 22 2008

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
ROGER L. SANDERS AND ROGER THACKER,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF SENATOR CHARLES E. GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

RITA LARI JOCHUM
Chief Counsel
NICK PODSIADLY, *Counsel*
SEN. CHARLES E. GRASSLEY
UNITED STATES SENATE
COMMITTEE ON THE
JUDICIARY
135 Hart Senate Office Bldg
Washington, D.C. 20510
(202) 224-4200

FREDERICK M. MORGAN, JR.
Counsel of Record
MORGAN VERKAMP LLC
700 Walnut Street
Suite 200
Cincinnati, Ohio 45202
(513) 651-4400

January 22, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRESENTMENT REQUIREMENT UNDER 31 U.S.C. § 3729(a)(2) AND (a)(3) 7

II. *TOTTEN'S* HOLDING THAT PRESENTMENT TO A FEDERAL ACTOR IS REQUIRED FOR A FALSE CLAIM TO BE ACTIONABLE IS INCONSISTENT WITH THE INTENT OF CONGRESS IN 1986 . 14

III. PETITIONERS AND THEIR *AMICI* TAKE SUBSTANTIAL LIBERTIES IN THEIR PURPORTED ANALYSIS OF CONGRESSIONAL INTENT 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page**

Murray & Sorenson, Inc. v. United States,
207 F.2d 119 (1st Cir. 1953) 10, 10 n.10

Oklahoma v. New Mexico,
501 U.S. 221 (1991) 4 n.5

United States v. Azzarelli Construction Co.,
647 F.2d 757 (7th Cir. 1981) 18

United States ex rel. Crews v.
NCS Healthcare of Illinois, Inc.,
460 F.3d 853 (7th Cir. 2006) 14

United States v. Lagerbush,
361 F.2d 449 (3d Cir. 1966) 11

United States ex rel. Atkins v. McInteer,
345 F. Supp. 2d 1302 (N.D. Ala. 2004),
aff'd on other grounds 470 F.3d 1350
(11th Cir. 2006) 19 n.18

United States ex rel. Costa v. Baker & Taylor,
1998 U.S. Dist. LEXIS 23509
(N.D. Cal. 1998) 12

United States ex rel. Davis v. Long's Drugs, Inc.,
411 F. Supp. 1144 (S.D. Cal. 1976) . 18, 18 n.17

United States ex rel. Luther v. Consolidated Industries, Inc., 720 F. Supp. 919 (N.D. Ala. 1989) 11

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 12

United States ex rel. Meyer Salzman v. Salant & Salant, Inc., 41 F.Supp. 196 (S.D.N.Y. 1938) 18 n.17

United States v. Nazon, 1993 U.S. Dist. LEXIS 15642 (N.D.Ill. 1993) 12

United States ex rel. Sanders v. Allison Engine Co., 471 F.3d 610 (6th Cir. 2006) ..... *passim*

United States ex rel. Totten v. Bombardier Corp., 363 U.S.App. D.C. 180, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005) ..... *passim*

United States ex rel. Yesudian v. Howard University, 332 U.S. App. D.C. 56, 153 F.3d 731 (D.C. Cir. 1998) 16-17

Wilkins ex. rel. United States v. State of Ohio, 885 F.Supp. 1055 (S.D. Ohio 1995), *aff'd* 1998 U.S. App. LEXIS 10537 (6th Cir. 1998) 12

Statutes

31 U.S.C. § 3729 *et seq.* 1

31 U.S.C. § 3729(a) 4, 17

31 U.S.C. § 3729(a)(1) 15-17

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) ..... *passim*

31 U.S.C. § 3729(c) 6, 8, 16

Congressional Materials

S. Rep. No. 99-435 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 6, 14-15, 18-19, 20, 23

False Claims Corrections Act of 2007, S.2041, 110th Cong. 4

False Claims Corrections Act of 2007, H.R. 4854, 110th Cong. 4 n3

Senate Committee on the Judiciary: S. Hrg. 109-158 15

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Senator Charles E. Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, *codified as amended* at 31 U.S.C. §§ 3729-3733. The 1986 Amendments substantially revised the original False Claims Act as enacted in 1863 and amended from time to time in the intervening decades. A primary focus of the Amendments was to provide the government and *qui tam* plaintiffs with relief from assorted court decisions which limited the reach of the False Claims Act.

Since enactment of the 1986 Amendments, civil cases brought under the False Claims Act have resulted in the return of more than $20 billion to the United States Treasury.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Data supporting this assertion appear on the Department of Justice's Public Affairs website at www.usdoj.gov/opa/pr/2007/November/07_civ_873.html (reporting recoveries through September 30, 2007).

Senator Grassley's views on the intent of Congress with respect to the modern False Claims Act are authoritative not just because he was the principal sponsor of the 1986 Amendments but also because he remains active in Congress defending the original intent of the legislation.

As the primary author of the 1986 amendments and a vigilant observer of their application, Senator Grassley has a strong interest in sharing his intentions in drafting the 1986 amendments, and particularly in asserting that Congress did not intend that 31 U.S.C. §§ 3729(a)(2)-(3) require proof that a claim was submitted to an employee or agency of the United States.

In short, Petitioners ask this Court to construe the statute in a manner diametrically opposed to the clearly-expressed intent of the legislator who proposed it. Senator Grassley, therefore, has directed the preparation of this brief.

SUMMARY OF ARGUMENT

Senator Grassley believes that the Sixth Circuit correctly concluded that 31 U.S.C. §§ 3729(a)(2) and (3) do not require presentment of false claims to a federal agency or employee, and that the result urged by Petitioners and their *amici* is not consistent with the plain language of the False Claims Act. These points will be amplified by the Solicitor General and others.

Senator Grassley's purpose in participating in this proceeding is to ensure that, if the Court finds it necessary to consider the intent of Congress in construing subsections (a)(2) and (a)(3), it understands that the result urged by Petitioners is *assuredly* not what Congress had in mind.

If the Court finds ambiguity in the words of the statute, then the intent of Congress controls, absent inconsistencies—and there are none here—between the statutory language and the legislative history.

There arguably is room for discussion regarding whether the language of 31 U.S.C. § 3729(a) requires presentment of a false claim to a federal actor when subcontractors or grantees are the initial recipient of a claim for payment. While disagreeing with the analysis, Senator Grassley has introduced new legislation to clarify that § 3729(a) does not require presentment to a government employee.[3]

Notwithstanding that effort, subsections 3729(a)(2) and (a)(3), which are at issue in this appeal, are not ambiguous and do not include language which reasonably can be construed to limit the scope of the Act to those claims which are submitted to a federal employee or agent rather than a federal grantee or contractor.

Indeed, now-Chief Justice Roberts, directly contradicting Petitioners' position, has written

[3] False Claims Corrections Act of 2007, S.2041, 110th Cong. This legislation was introduced specifically to remedy judicial interpretations of the 1986 Amendments which are inconsistent with Congress's intent. Bipartisan legislation also has been introduced in the House of Representatives. False Claims Act Corrections Act of 2007, H.R. 4854, 110th Cong.

that subsection (a)(2) "has no express requirement of presentment to an officer or employee of the United States Government."[4]

But even if these provisions *were* ambiguous, this Court's precedents establish that where ambiguity is found, legislative history is worth considering, and here, the legislative history is bell-clear against Petitioners:[5] Congress did not intend there to be a presentment requirement under subsections 3729(a)(2) or (a)(3).

Given the absence of any reference to presentment in the plain language of these provisions, buttressed by the undisputable legislative history related to them, it is not surprising that the Sixth Circuit got it right. The claims which form the predicate for False Claims Act liability are those made by the subcontractors to the shipbuilders, rather than the claims from

[4] *United States ex rel. Totten v. Bombardier Corp.*, 363 U.S.App. D.C. 180, 380 F.3d 488, 496 (D.C. Cir. 2004) (Roberts, J.), *cert. denied*, 544 U.S. 1032 (2005).

[5] *See generally Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991) ("we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous").

the shipbuilders to the Navy.

Arguments to the contrary by Petitioners and their *amici* not only exalt form over substance, they turn a blind eye toward the essence of the 1986 Amendments: ensuring that the False Claims Act reaches "*all* fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S. Rep. No. 99-435 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (emphasis supplied).

The Sixth Circuit properly recognized this, quoting the legislative history at length and finding that Congress *accomplished* its goal of "overrul[ing] restrictive judicial interpretations of the FCA and increas[ing] the reach of the statute" by adding subsection 31 U.S.C. § 3729(c) to the Act. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 615 (6th Cir. 2006).

Notwithstanding the lack of statutory language or legislative history supporting their position, Petitioners' request that this Court adopt the presentment requirement imposed by *Totten* is

inappropriate. The legislative history of the 1986 Amendments is clear and convincing. While Petitioners and their *amici* claim the contrary, the express legislative history does not support their position that presentment is a precondition for liability under (a)(2) and (a)(3). Instead, the legislative history supports the opposite.

Because the Sixth Circuit's decision accurately states how Congress intended these provisions to be applied, its opinion should be affirmed.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRESENTMENT REQUIREMENT UNDER 31 U.S.C. § 3729(a)(2) AND (a)(3)

The Sixth Circuit carefully and correctly held that Sections 3729(a)(2) and (a)(3) make no mention of the presenting of a claim, and that there is no implied requirement of presentment to a government agency or employee. The court looked to the plain language of the statute and also examined the legislative history underlying

the 1986 Amendments. Senator Grassley agrees with the Sixth Circuit's analysis.

Petitioners do not dispute that the many millions of military procurement dollars they received came from the taxpayers of this Nation, appropriated by Congress to buy a major Navy weapons system—the Arleigh-Burke class Guided Missile Destroyers.[6] To have the case taken from the Jury because the claims from the shipbuilders to the United States were not admitted into evidence[7] is not consistent with 31 U.S.C. § 3729(c), and is certainly not consistent with what Congress intended in 1986.

Section 3729(c) states:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such

[6] *Sanders*, 471 F.3d at 612.

[7] *Id.* at 613.

> contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

This statute, added in 1986 to cover precisely situations such as this, establishes—and was intended to establish—that if the Act was violated by Petitioners, the violation was complete when the subcontractor submitted a false claim to the shipbuilder. If the shipbuilder failed to present a subcontractor's false claim to the United States (something which could result as easily from bookkeeping error as a prime contractor's payment system) but still paid the subcontractor with government money, the subcontractor has *used a false document to get a false claim paid*, as prohibited by subsection (a)(2).[8]

[8] As the former Chairman and current Ranking Member of the Senate Finance Committee, and as a senior member of the Senate Judiciary Committee, Senator Grassley has devoted his Senate career to vigorous oversight of the Executive Branch. This includes countless investigations into federal spending by the Department of Defense, including investigations in the 1980s which uncovered the purchase of $700 toilet seats by that Department. Senator Grassley knows well that *all* money used to pay for the Navy's destroyer fleet came from the taxpayers of the United States, and that the efforts of those taxpayers through their elected representatives to combat fraud, waste, and abuse of

Allegedly-false claims such as those of Petitioners, where a false claim by a subcontractor is made to a prime contractor, have been held to violate the False Claims Act. In fact, this was a judicially-accepted interpretation of the Act long before the 1986 Amendments.[9]

In *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953), the court held that a subcontractor was liable for submission of false claims to a prime contractor: "The fact that the claims . . . were not presented directly to the Government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute."[10] In another case

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that money deserve great respect.

[9] Judge Garland perceptively noted in his dissenting opinion in *Totten* that the Senate Judiciary Committee Report clearly indicates that in enacting the 1986 Amendments, Congress was *clarifying* that claims submitted by subcontractors or others to prime contractors or grantees were always covered under the Act, rather than constituting a new class of liability. *Totten*, 380 F.3d at 508.

[10] The *Murray* panel did not address whether the prime contractor submitted the subcontractor's bill to a contracting officer, underscoring that what mattered was the submission of a false claim by the subcontractor to the prime contractor.

involving subcontractors, the Fifth Circuit expressed "no doubt that the False Claims Act covers such an indirect mulcting of the Government." *United States v. Lagerbush*, 361 F.2d 449, 449-50 (3d Cir. 1966) (*per curiam*) (government "paid or reimbursed" all of the prime contractor's costs).

After the 1986 Amendments, courts had no problem concluding that claims to subcontractors or grantees could violate the Act without presentment to a federal actor. The court in *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F. Supp. 919, 920-21 (N.D. Ala. 1989) relied on these pre-1986 cases to squarely reject the proposition that the case had to be dismissed "because the relator did not allege that the Government actually paid or approved a false or fraudulent claim."[11]

District judges reached the same result in,

[11] These cases dispense with the argument of Petitioners' *amicus* Continental Common, Inc., whose singular point is that Congress did not, in 1986, change the language of subsection (a)(2). Congress believed that it had already ensured that subcontractors were liable under the Act for submitting false claims to prime contractors, and merely sought through enactment of subsection (c) to drive the point home.

at least, *United States ex rel. Costa v. Baker & Taylor*, 1998 U.S. Dist. LEXIS 23509 (N.D. Cal. 1998) (relying on plain language of § 3729(c)); *United States v. Nazon*,1993 U.S. Dist. LEXIS 15642 (N.D.Ill. 1993) (applying § 3729(c)); *Wilkins ex. rel. United States v. State of Ohio*, 885 F.Supp. 1055 (S.D. Ohio 1995), *aff'd* 1998 U.S. App. LEXIS 10537 (6th Cir. Ohio May 20, 1998) (§ 3729(c) is "broad enough to include any funds provided directly or indirectly by the United States, regardless of whether the grant was in a fixed amount or open-ended").

These holdings are consistent with what this Court said in *United States ex rel. Marcus v. Hess*: "Government money is as truly expended whether by checks drawn against the Treasury to the ultimate recipient or by grants in aid." 317 U.S. 537, 544-45 (1943).

It is remarkable that, fully 65 years after the Court decided *Marcus*, Petitioners ask it to decide that a party accused of cheating the Navy can avoid liability by adopting the pretense that

"Congress, after proclaiming its purpose to reach fraud regardless of presentment, then subverted that purpose using words that do not mention presentment at all." *Totten*, 383 F.3d at 508 (Garland, J., dissenting).

Presentment to a federal agency or employee is simply not a precondition to liability under subsections (a)(2) and (a)(3). The statute makes no mention of such presentment, and Congress did not intend that it be required. The Courts held, long before the 1986 amendments, that subcontractors are subject to False Claims Act liability regardless of the intricacies of the prime contractor's paperwork. Besides *Totten*—and that decision was wrong, as we explain below— Petitioners and their *amici* have no credible evidence that it did.

II. *TOTTEN'S* HOLDING THAT PRESENTMENT TO A FEDERAL ACTOR IS REQUIRED FOR A FALSE CLAIM TO BE ACTIONABLE IS INCONSISTENT WITH THE INTENT OF CONGRESS

Petitioners argue that the *Totten* majority decision should control this Court's interpretation of (a)(2) and (a)(3). For that to be true, either the statute must be clear on its face (which, as *Totten* itself acknowledges, it is not; 380 F.3d at 496) or the legislative history must be consistent with Petitioners' arguments.

No other court of appeals has agreed with the *Totten* majority. Nor was the Sixth Circuit the first to conclude that presentment is not required under § 3729(a)(2). In *United States ex rel. Crews v. NCS Healthcare of Illinois, Inc.*, 460 F.3d 853, 856 (7th Cir. 2006), the panel held that (a)(2) requires only that "the defendant made a statement in order to receive money from the government."

Senator Grassley and Congress intended precisely the result the Sixth Circuit reached here. The purpose of the 1986 Amendments was "to

enhance the Government's ability to recover losses sustained as a result of fraud[.]" S. Rep. 99-345 at 1. "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.* at 5275. "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." *Id.*

In 2005, when the now-Chief Justice appeared before the Senate Judiciary Committee for confirmation to this Court, Senator Grassley questioned him closely regarding the unwillingness to accede to the intent of Congress which the *Totten* opinion evidences. The Chief Justice responded that "the statutory language [in § 3729(a)(1)] that said the claim had to be presented to an officer or employee presented too high a hurdle for us to get over in looking at the

legislative history."[12]

Senator Grassley respectfully contests that analysis of the statute. As Judge Garland made clear in his dissenting opinion in *Totten*,[13] and as the Sixth Circuit majority in the case before the Court detailed at length,[14] the 1986 Amendments include a section which was written to support liability in *Totten*.

31 U.S.C. § 3729(c) fully and squarely identifies the shipbuilders at issue in this case: contractors who are reimbursed with federal dollars for the money which was requested by the defendant subcontractors.[15]

As Judge Garland wrote in *Totten*:

[12] *Senate Committee on the Judiciary: S. Hrg. 109-158*, Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, September 14, 2005.

[13] 380 F.3d at 510.

[14] *Sanders*, 471 F.3d at 614-15.

[15] Petitioners' suggestion that subsection (a)(2) *unambiguously* (albeit *silently*) includes a presentment requirement because it includes the phrase "paid or approved by the Government" simply ignores the language of subsection (c). Congress plainly intended that provision to place grantees in the position of the government for presentment purposes.

> As discussed in *United States ex rel. Yesudian v. Howard University*, the conclusion that liability under § 3729(a)(1) requires that a false claim be presented to the government rather than a grantee is difficult to reconcile with § 3729(c), and perhaps impossible to reconcile with the Act's legislative history. 332 U.S. App. D.C. 56, 153 F.3d 731, 737-38 (D.C. Cir. 1998)[.] Nonetheless, subsection (a)(1)'s language renders this reading 'possible,' *Yesudian*, 153 F.3d at 738, and perhaps would not alone warrant a dissent. As discussed below, however, what is a plausible reading of subsection (a)(1)—given its 'presents, or causes to be presented' language—is not plausible for subsection (a)(2), which contains no such language.
>
> Moreover, even if subsection (a)(1) were read as imposing a presentment requirement, reading subsection (a)(2) as not also imposing such a requirement goes a long way toward reconciling § 3729(a) as a whole with § 3729(c) and the legislative history that indicates Congress intended to reach false claims made to grantees.

380 F.3d at 503.

The Senate Judiciary Committee Report which accompanied the 1986 Amendments establishes that in drafting subsection (c), Congress expressly intended to extend False Claims Act liability to claims submitted to recipients of federal funds, including contractors (like the shipbuilders here) and grantees. Congress sought to craft a legislative solution to what the *Totten* majority deduced was "the decision that the Senate Judiciary Committee most clearly intended to overrule"[16]–that of the Seventh Circuit in *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), which held that False Claims Act liability could lie only where there was "a claim presented 'upon or against the Government of the United States[.]'"[17]

[16] 380 F.3d at 495.

[17] The *Totten* majority concluded that the Committee's disagreement with *Azzarelli* was not really a presentment issue because it involved yearly grant funds, and that there was thus no tension between its holding and Congress's desire to overrule. 380 F.3d at 495. While Judge Garland's dissent implies that the majority's distinction parsed too finely, 380 F.3d at 513, the point is moot because the Committee Report also makes clear its intention to repudiate the decision in *United States ex rel. Meyer Salzman v. Salant & Salant, Inc.*, 41 F.Supp. 196 (S.D.N.Y. 1938), which held

The Committee report, moreover, noted approvingly *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1149 (S.D. Cal. 1976) ("false claims submitted to a state Medicaid program, such as MediCal, are claims against the United States within the meaning of the False Claims Act"). S. Rep. No. 99-345 at 21.[18]

The Committee Report clearly outlines Congress's purpose: "[T]o enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *Id.* at 1. Congress wrote § 3729(c) for the expressed purpose of overturning cases which "have limited the ability of the United States to reach fraud perpetrated by federal grantees, contractors or other recipients of Federal funds." *Id.* At 22.

Petitioners' request that this court apply

that a company which submitted false claims to the Red Cross as the Government's grantee was immune from False Claims Act liability. S. Rep. 99-345 at 21.

[18] The pernicious effect of *Totten* is best demonstrated by the poorly-reasoned district court decision in *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff'd on other grounds* 470 F.3d 1350 (11th Cir. 2006), that false billings to state Medicaid programs were not within the ambit of the False Claims Act.

Totten's flawed presentment analysis to this case is inappropriate. The language of the Act does not compel it. Application of the *Totten* presentment requirement to subsections 3729(a)(2) and (a)(3) is sharply contradicted by Congress's intent as expressed in the legislative history. The court in *Totten* got it wrong, and it would be contrary to the will of the legislative branch if this Court were now to extend to subsections 3729(a)(2) and (a)(3) a requirement that a claim be presented directly to a government employee.

III. PETITIONERS AND THEIR *AMICI* TAKE SUBSTANTIAL LIBERTIES IN THEIR PURPORTED ANALYSIS OF CONGRESSIONAL INTENT

Petitioners studiously ignore the legislative history clearly set out in S.R. No. 99-345. Petitioners assert that

> Congress's intention in enacting [subsection (a)(2)] could not have been clearer: The phrase 'paid or approved *by the Government*' unambiguously establishes that Congress intended to impose liability where a false claim has been submitted to the federal government for payment or

> approval. Indeed, for a claim to be 'paid or approved by the Government,' it first must be submitted to the government.

Br. Pet. at 13 (emphasis in original). This claim is an obvious attempt to avoid inquiry into the *actual* intent of Congress, as made clear in the legislative history, while suggesting that Congress's intention "could not have been clearer" to reach the result Petitioner advocates.

It is not surprising that Petitioners provide no credible support for their view of the legislative purpose of Congress, for they are patently wrong about what was intended. Congress wanted to reach precisely the sort of "indirect mulcting of the Government" which is alleged to have occurred in this case, and went out of its way to generate both statutory language (31 U.S.C. § 3729(c)) and legislative history (S. Rep. 99–345) to do so.

Petitioners seem to suggest that the Sixth Circuit's decision exposes to liability, for example, the company which sells a shipbuilder its Post-It notes, simply because the shipbuilder is a government contractor. This fanciful prediction is

neither what the Sixth Circuit held nor what Congress intended. Rather, that court held that liability under subsection (a)(2) depends upon proof "that the subcontractor's use of the false statement resulted in the payment of the claim by the government." *Sanders*, 471 F.3d at 621. The court also relied on case law holding that the falsity of a claim, to be actionable, must be material, *i.e.*, capable of influencing the government's decision to pay. *Id.* at 623 n.7.

In this case, there was plenty of testimony that the ship-builders paid for Petitioners' generator sets with money obtained from the Navy. Br. Resp. at 3-4. Petitioners' parade of horribles is an analytically-untested smokescreen intended to influence with hyperbolic policy claims the Court's analysis of the plain language of §§ 3729(a)(2)–(3). While Petitioners are free to approach Congress with their concerns, their appeals to emotion are misplaced in this forum.

Petitioners' *amici* U.S. Chamber of Commerce, *et al.* suggest that Congress must *sub*

silentio have intended to imply a presentment requirement in (a)(2) and (3) because the claim has to be paid or approved and, according to the Chamber, "[q]uite simply, the Government cannot pay or approve a claim that the Government never saw." Br. *Amicus* at 25.

This argument ignores subsection (c), which Congress intended to put a prime contractor or grantee in the position of the United States for purposes of the submission of a claim. The Senate Report states that Congress specifically intended that subsection (c) cover situations where, after "the United States has made the grant to the State, local government unit, or other institution, it substantially relinquishes all control over the disposition of the money or commodities and requires only that the grantee shall make periodic reports of its disbursements and activities." S. Rep. No. 99-345 at 21.

Congress did not intend to require re-presentment of claims against money of which "it substantially relinquishes all control over the

disposition." The argument that Congress intended to require presentment as a precondition to liability under (a)(2) or (a)(3) is simply not supported by the legislative record.

Petitioners' arguments are not supported by the legislative history of the 1986 Amendments. The Court should not credit their claims that Congress *intended* the result they urge. Congress did not, and no one is in a better position to attest thereto than Senator Grassley.

CONCLUSION

This Court should not set the False Claims Act back a century by insisting that, despite the clear and unambiguous language of §§ 3729(a)(2) and (a)(3) and the clear intent of Congress, the Act has application only where there is presentment to the United States, rather than to a contractor or grantee.

This Court should not adopt the flawed *Totten* analysis. To imply such a requirement where Congress not only did not write it, but made

clear that it intended otherwise, is contrary to both the principles of statutory interpretation set forth in the Court's precedents and the expressed will of the United States Congress.

The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

FREDERICK M. MORGAN, JR.
Counsel of Record
MORGAN VERKAMP LLC
700 Walnut Street
Suite 200
Cincinnati, Ohio 45202
(513) 651-4400

RITA LARI JOCHUM
Chief Counsel
NICK PODSIADLY, *Counsel*
SEN. CHARLES E. GRASSLEY
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
135 Hart Senate Office Bldg.
Washington, D.C. 20510
(202) 224-4200

Counsel for Amicus, Senator Charles Grassley

AMICUS CURIAE BRIEF

C2 58301a (11 32pgs

No. 07-214

FILED
JAN 22 2008
OFFICE OF THE CLERK
SUPREME COURT

In The Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES *EX REL.* ROGER L. SANDERS and ROGER L. THACKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GRAYSON & KUBLI, P.C. AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

Alan M. Grayson
Counsel of Record
Victor A. Kubli
Jesselyn A. Radack
GRAYSON & KUBLI, P.C.
8605 Westwood Center Drive, Suite 410
Vienna, Virginia 22182
(703) 749-0000

Counsel for Amicus Curiae

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE HISTORY AND HISTORICAL INTERPRETATION OF THE FALSE CLAIMS ACT DEMONSTRATE THAT "PRESENTMENT" IS NOT A PREREQUISITE FOR LIABILITY UNDER § 3729(a)(2) OR (3) 7

A. The Plain Language of § 3729(a)(2) and (3) Does Not Support the Reading of a "Presentment Requirement" into the False Claims Act 7

B. The Legislative History Accompanying the Most Recent Change to the False Claims Act Does Not Support a Reading of a "Presentment Requirement" Into the Statute 10

C. Policy Rationales and Precedent Do Not Support Reading a Presentment Requirement Into the False Claims Act 15

II. WHY *TOTTEN* DOES NOT APPLY .. 17

A. The *Totten* Decision 17

B. How the *Totten* Court Misinterpreted and Misapplied the FCA 19

C. Why the Sixth Circuit Was Correct In Rejecting *Totten* 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 8, 19

Bates v. United States,
522 U.S. 23 (1997) 9, 10

Bennett v. Spear,
520 U.S. 154 (1997) 20

Conn. Nat'l. Bank v. Germain,
503 U.S. 249 (1992) 7

Cook County v. United States ex. rel. Chandler,
538 U.S. 119 (2003) 14

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 7

Harrison v. Westinghouse Savannah River Co.,
176 F.3d 776 (4th Cir. 1999).....16

Hartford Underwriters Ins. Co. v.
Union Planters Bank, N.A.,
530 U.S. 1 (2000) 11

Peterson v. Weinberger,
508 F.2d 45 (5th Cir. 1975), *cert. denied*,
423 U.S. 830 (1975) 25

Rainwater v. United States,
356 U.S. 590 (1958) 15, 26

Rex Trailer Co. v. United States,
350 U.S. 148 (1956) 20-21, 26

United States ex rel. Cartwright v. Balfour Beatty,
Civil No. 3:99CV02585 (JCH)
(D. Ct. Oct. 2005) 2

United States ex rel. DRC, Inc. v.
Custer Battles, LLC,
444 F. Supp. 2d 678 (E.D. Va. 2006) 3

United States ex rel. Farmer v. City of Houston,
2006 WL 2382327 (S.D. Tex. 2006) 8

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 9, 15, 16, 17

United States ex rel. Salzman v.
Salant & Salant,
41 F. Supp. 196 (S.D.N.Y. 1938) 12

United States ex rel. Thacker v.
Allison Engine Company, Inc.,
471 F.3d 610 (6th Cir. 2006) ..... *passim*

United States ex rel. Totten v.
Bombardier Corporation,
380 F.3d 488 (D.C. Cir. 2004), *cert. denied*,
544 U.S. 1032 (2005) ..... *passim*

United States v. Bornstein,
423 U.S. 303 (1976) 24

United States v. Lagerbusch,
361 F.2d 449 (3d Cir. 1966).....17

United States v. Neifert-White Co.,
390 U.S. 228 (1968).....*passim*

United States v. Rivera,
55 F.3d 703 (1st Cir. 1995).....21

FEDERAL LAW

False Claims Act,
31 U.S.C. §§ 3729-32 (2000).....*passim*

OTHER AUTHORITIES

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary, S. Hrg. 109-159, 109th Cong. 321 (2005).....2

Cong. Globe, 37th Cong., 3d Sess. 952 (1863).....11

Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report, Hearing Before the House Comm. on Oversight and Gov't Reform, 110th Cong. (2007).....1

H.R. Rep. No. 37-2 (1861).....11

H.R. Rep. No. 99-660 (1986).....13

S. Rep. No. 99-345 (1986).....12, 14

S. Rep. No. 99-435 (1986).....12, 13

INTERESTS OF THE *AMICUS*[1]

The *Amicus*, Grayson & Kubli, P.C., files this brief in support of the Respondents in order to bring to this Court's attention the importance of the Sixth Circuit's decision holding that there is no "presentment" requirement in Sections 3729(a)(2) or 3729(a)(3) of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* *Amicus* has the consent of all parties to file this brief.

Amicus represents FCA relators in a variety of *qui tam* actions, including in the area of reconstruction fraud in Iraq. There is nothing new about the military's use of private contractors, but the Iraq War has seen outsourcing on an unprecedented scale. *See generally Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report, Hearing Before the House Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) ("Iraq Reconstruction Hearing.").

In the proceedings below, the Court of Appeals for the Sixth Circuit correctly held in *United States ex rel. Thacker v. Allison Engine Company, Inc.*, 471 F.3d 610 (6th Cir. 2006) that the district court erred in reading a blanket "presentment" requirement into

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[1] Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

all subsections of FCA § 2729(a). Specifically, the Sixth Circuit held that while liability under FCA § 3729(a)(1) turns on whether a claim has been presented to the Government, subsections (a)(2) (proscribing the creation of false records or documents to get a false claim paid) and (a)(3) (conspiracy) of that section include no such "presentment" element.

The Sixth Circuit specifically rejected a sister Circuit's reading of a "presentment" element into FCA §§ 3729(a)(1)-(2) in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). The author of this decision, then-Judge John Roberts, has acknowledged the validity of conflicting views about his analysis. During his Senate confirmation hearing, he observed that "it's certainly possible that the majority in [*Totten*] didn't get it right . . . Judge Garland disagreed, and so it's obviously, to me, a case on which reasonable judges can disagree." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-159, 109th Cong. 321 (2005). The uncertainty surrounding the *Totten* interpretation of the False Claims Act potentially led to the FCA settlement involving a contractor defrauding Amtrak, under a factual situation that was almost identical to the facts in *Totten*. *See United States ex rel. Cartwright v. Balfour Beatty*, Civil No. 3:99CV02585 (JCH) (D. Ct. 2005).

Grayson & Kubli, P.C.'s specific interest in this matter is its representation of the relators in the

first FCA case involving Iraq reconstruction contractor fraud to go to trial, which resulted in a jury verdict of multiple violations of FCA §§ 3729(a)(1)-(2) and damages amounting to over $10 million. Months later, the trial court entered judgment notwithstanding the verdict on the violations of Sections 3729(a)(1) and 3729(a)(2), ruling that both of these subsections require "presentment" and that there was no evidence that the defendants' false claims and records had been "presented" to officers and employees of the U.S. Government. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 687 (E.D. Va. 2006). The case is on appeal and the United States submitted an *amicus* brief in support of the relators, arguing that "presentment is not a prerequisite for liability under § 3729(a)(2)"—a viewpoint that if accepted by the Fourth Circuit Court of Appeals likely would result in the jury verdict of violations of FCA § 3729(a)(2) being reinstated. *See* Br. for the U.S. as *Amicus Curiae* in Supp. of Appellants in *United States ex rel. DRC, Inc., et al. v. Custer Battles, et al.*, No. 07-1220 at 9-14.

More generally, as congressional oversight hearings have established, in the Iraq War, "tiering of charges by layers of subcontractors exorbitantly inflated the price paid by the Government under cost-plus agreements." Iraq Reconstruction Hearing, *supra*, at 18. The Hearing documented pyramid billing schemes with the "tiering" of charges by multiple layers of subcontractors, often six layers deep. *See id.* at 102. Under the tortured reasoning that the Sixth Circuit soundly rejected, second-tier,

third-tier, and all subordinate contractors would be immune for fraudulently billing a prime contactor that paid the inflated claims out of the Government fisc.

As shown below, the Sixth Circuit's holding in *Thacker* comports with the plain language of § 3729, the legislative history accompanying the most recent change to the statute, and the policy rationales behind the False Claims Act, as recognized by this Court. To hold otherwise would be to grant *de facto* immunity to subcontractors who use false records or conspire in order to get false claims paid with U.S. Government funds.

SUMMARY OF ARGUMENT

Even before its 1986 amendments, the FCA was written broadly "to reach all types of fraud, without qualification, that might result in *financial loss to the Government.*" *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added). FCA § 3729(a)(1) applies to any person who: "knowingly makes . . . a false record . . . to get a false or fraudulent claim . . . paid . . . by the Government." *Id.* § 3729(a)(2). By contrast, the language of FCA §§ 3729(a)(2)-(7) contain no such "presentment" language.

The Sixth Circuit's decision that there is no presentment requirement in FCA §§ 3729(a)(2)-(3) therefore should be affirmed. *Thacker*, 471 F.3d at 615. The ruling of the district court in the instant

case,[2] which the Sixth Circuit correctly reversed, misinterprets the FCA by impermissibly legislating a presentment requirement into FCA § 3729(a)(2). Its reading of the FCA is contrary to the FCA's plain language, legislative history and purpose. It is also dangerously unmindful of the real-world implications on the curbing of today's war profiteering occurring in Iraq.

More specifically, FCA § 3729(a)(2) liability inquiry begins and ends with whether the false records were "made to" wrongfully obtain U.S. Government funds as that section explicitly states. In this case, while the district court recognized that "all of the money used to pay the relevant prime contracts and subcontracts . . . came from the government," *see Thacker*, 471 F.3d at 613, it constructed an extra-textual requirement that restricts the reach of the FCA in a manner that Congress did not intend, leaving billions of dollars in U.S. Government funds unrecoverable. The district court decision was legally unsustainable, and the Sixth Circuit correctly reversed.

In appending a "presentment" element to FCA § 3729(a)(2) liability, the lower court's ruling combines the requirements of two distinct liability provisions of the False Claims Act: as noted above, the language of FCA § 3729(a)(1) explicitly attaches liability to those "who . . . *present*[] . . . to an . . . employee of the United States Government . . . a false . . . claim for payment." *Id.* at 614 (emphasis

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[2] The opinion of the U.S. District Court for the Southern District of Ohio is unpublished but is electronically reported at 2005 WL 713569.

added). Section 3729(a)(2), on the other hand, applies to those "who . . . *make*[] . . . a false record . . . to get a false or fraudulent claim . . . paid by the Government." *Id.* (emphasis added). In addition, the district court overly-restricted the plain meaning of FCA § 3729(c), which, by its very terms, defines "claim" to include those which are "made to" recipients of federal funds in which the "United States Government provides any portion of the money or property which is requested or demanded." *Id.* at 614-18. In turn, by impermissibly "amending" § 3729(a)(2), the district court legislated an additional requirement that the fraudfeasor's claim be "paid or approved [directly] by the Government." *Id.* at 615-18.

In addition, the district court overly-restricted the plain meaning of FCA § 3729(c), which defines "claim" to include those 'made to" recipients of federal funds in which the "United States Government provides any portion of the money or property which is requested or demanded." *Id.* By impermissibly "amending" FCA § 3729(a)(2), the district court effectively eliminated the definition of the term "claim' in FCA § 3729(c) insofar as the term "claim" is used in FCA § 3729(a)(2).

In actuality, the plain language of the FCA includes no "presentment" requirement as an element of § 3729(a)(2) liability. Moreover, the applicable legislative history shows beyond question that the result reached by the district court is contrary to the intent of Congress. Finally, because of the unprecedented reliance on private government contractors in the Iraq War, the district court's

flawed reasoning raises a concern for all Americans. The real-world implication of the district court's wayward decision, and that of the *Totten* Court upon which it relied, is that an FCA enforcement-free zone now exists in Iraq, permitting dishonest subcontractors to hide behind prime contractors when it comes to defrauding the U.S. Government.

Amicus respectfully requests this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE HISTORY AND HISTORICAL INTERPRETATION OF THE FALSE CLAIMS ACT DEMONSTRATE THAT "PRESENTMENT" IS NOT AN ELEMENT OF LIABILITY UNDER 31 U.S.C. § 3729(a)(2)-(3).

A. The Plain Language of 31 U.S.C. §§ 3729(a)(2)-(3) Contains No Presentment Requirement.

To determine the meaning of a statute, this Court first looks to the plain language of the statute itself. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citing *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The plain language of the FCA states that actual presentment of a claim to the Government is required under one, but not all, of the statute's sections. Namely, only subsection 3729(a)(1) of the

statute makes any mention of presenting a claim to the Government or Armed Forces. FCA §§ 3729 (a)(2)-(3), which are separate FCA violations, contain no such presentment language.

As noted above, Subsection (a)(1) applies to any person who "knowingly makes . . . a false record . . . to get a false or fraudulent claim paid . . . by the Government." Subsection (a)(2) requires only that a defendant "make[ ]" or "use[ ]" a "false record or statement" in order to induce the Government to pay or approve a claim. FCA § 3729(a)(2). Subsection (a)(3) requires a conspiracy to defraud the Government to pay or allow a false claim. *Id.* at § 3729(a)(3).

By its terms, FCA § 3729(a) not only applies to a defendant who "presents" a false claim to the Government, but also to a defendant who "makes" a false record to get a false claim "paid . . . by the Government." *Id.* at § 3729(a)(1)-(2). Courts, respecting the different language in each of these two distinct FCA liability provisions, echo the warning of the Supreme Court that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). Indeed, evidently with the exception of a lone Texas district court[3] and the *dicta*

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[3] *United States ex rel. Farmer v. City of Houston*, 2006 WL 2382327 (S.D. Tex. 2006).

statements from a split panel in *Totten*, discussed at greater length, *infra*, every single court that has addressed this issue has recognized this cause of action, even though a subcontractor does not directly bill the U.S. Government. *See e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (holding that a collusive bidding process by contractors employed by a local government to work on Public Works Administration projects could give rise to a claim under the FCA).

In addition to grafting the "presentment" language of FCA § 3729(a)(1) to FCA § 3729(a)(2) and disregarding this accepted theory of FCA liability, the lower court inserted an additional requirement into FCA § 3729(a) by attaching liability only when the fraudfeasor was paid directly by the Government. This is contrary to the Supreme Court's admonition against "reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997)

Moreover, the district court ignores the explicit definition of "claim" outlined in § 3729(c). The definition of "claim" in part (c) further supports the reading that presentment is not required under all sections of the statute. Most importantly for this case and others like it, § 3729(c) explicitly states that a claim is "*any* demand . . . for money or property which is made to a contractor . . . if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor . . . for any portion of the money or property which is requested or demanded." *Id.* § 3729(c) (emphasis

added). Thus Congress, in adding this definitional section to the Act, explicitly clarified that the fraudfeasor cannot escape liability by simply arguing that the claims were submitted to a recipient of federal funds (*i.e.*, the prime contractor), and not directly to the Government. The focus of this language is on the money *paid out by the Government* in response to a false statement or fraudulent request for payment. There is nothing in this language to suggest the claim must have been presented to the Government, so long as it can be shown that the claim was paid with Government funds.

The statute should be accorded the meaning expressed by its clear language. Congress wrote FCA § 3729(a)(2) without including a "presentment" requirement. Congress wrote a definition of actionable "claims" to include those not submitted to the Government. It is presumed that Congress acted deliberately in its drafting. *See Bates*, 522 U.S. at 29. Clearly, the language of the FCA and these fundamental principles of statutory construction demonstrate that "presentment" is not an element of liability under FCA §§ 3729(a)(2)-(3).

B. The Legislative History Accompanying the Most Recent Change to the False Claims Act Does Not Support Reading a Presenting Requirement Into 31 U.S.C. §§ 3729(a)(2)-(3).

The plain language of FCA §§ 3729(a)(2)-(3) includes no "presentment" requirement and the

FCA's definition of "claim" unambiguously reaches false claims for federal dollars that are not "presented" to a federal Government employee; therefore, the Court does not need to look further to affirm the Sixth Circuit. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (holding that "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.*). The fact that Petitioners delve at length into the origins and legislative history of the FCA to support an implied addition of "presentment" to FCA § 3729(a)(2), Pet. Br. at 21-22, 26-28, undermines their argument that the plain meaning of this subsection contains a presentment requirement in (a)(2). *Id.* at 21. The legislative history, in fact, shows that Congress did not limit the FCA's reach to only false records directly "presented" to the Government.

The FCA is the Government's primary tool for combating contractor fraud. It was enacted for the specific purpose of punishing war profiteering, *viz.*, the decrepit horse and mules, faulty rifles and ammunition, and rancid provisions that unscrupulous military contractors sold to the Union Army during the Civil War. See H.R. Rep. No. 37-2, at 54 (1861). President Lincoln deputized whistleblowers to bring forth evidence of fraud, and to litigate such cases against war profiteers, in the name of the Government. In this context, in 1863, Congress enacted the FCA. Act. of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97. *See* also Cong. Globe, 37th Cong., 3d Sess. 952 (1863). It is clear from the current incarnation of the FCA that Congress

intended for it to have the broadest reach possible, *see S. Comm. On the* Judiciary, *False Claims Act of 1986*, S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, and its legislative history echoes the Sixth Circuit's interpretation of the statutory language. *Id.*

The Committee Reports written when Congress restructured FCA § 3729 in 1986, breaking section (a) into additional subsections and adding subsection (c), indicate that Congress intended to broaden the reach of the FCA to cover fraudulent claims submitted by subcontractors that result in loss to the Government. Public Law 99-562, 100 Stat. 3159 (1986). Notably, prior to the 1986 amendments to the FCA, some courts applied a misinterpretation similar to *Totten*, ruling that false claims submitted to a recipient of federal funds were not covered by the False Claims Act.[4]

The purpose of the 1986 change was "to enhance the Government's ability to recover losses sustained as a result of fraud . . . " S. Rep. No. 99-

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[4] *See, e.g., United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938). Congress wanted to overrule this case, which concerned a situation nearly identical to the one in the instant case: false claims for federal funds were not presented directly to a Government employee, so the trial court found that the FCA was not implicated. S. Rep. No. 99-435 at 22 (1986). In *Salzman*, the district court dismissed an FCA action involving false claims submitted to the Red Cross – and not re-presented to a Government employee – reasoning that even though the Red Cross received federal grant money, it was not the "government" for FCA purposes. 41 F. Supp. at 197.

435, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Senate Report goes on to note that the amendment was "aimed at correcting restrictive interpretations of [the FCA]" by the courts[5] "in order to make the [FCA] a more effective weapon against Government fraud." *Id.* at 5269. The Report clearly states that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 5274. "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.* at 5275. "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." *Id.*

The House Report reached a similar conclusion: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986). There is no indication that a claim must be presented to the Government in order to be actionable. Petitioners presume that "loss to the United States" only happens "if the claim was ultimately passed along to the government." Pet. Br. at 28 (quoting S. Rep. No. 99-435, at 10 (1986). But this is a disingenuous reading. Congress did not need to clarify that claims "passed along" to the Government are actionable, since subsection (a)(1)

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5 *Id.*

already prohibits "causing" presentment of false claims.

Be rewording the statute and adding subsection (c), Congress accomplished its desired expansion of the FCA. The addition of the § 3729(c) definition of "claim" unambiguously etched the underlying congressional intent into the False Claims Act. Congress, specifically intending to reject the kind of reasoning that the district court espoused in the present case, clarified that "a false claim is actionable although the claim or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10. Indeed, Congress endorsed the Supreme Court's interpretation that the Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). As this Court recently noted, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex. rel. Chandler*, 538 U.S. 119, 129 (2003).

The House and Senate reports evidence that Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute, including making the FCA applicable to cases in which the Government sustains a financial loss, regardless of

whether the false claim is actually presented directly to the Government.

C. Policy and Precedent Do Not Support Reading a Presentment Requirement Into FCA §§ 3729(a)(2)-(3).

While the plain language and legislative history of the statute provide a conclusive answer to the question presented, the narrow view of the FCA's scope advanced by Petitioners does not comport with the weight of authority interpreting the False Claims Act. The Supreme Court has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly. *See Neifert-White Co.*, 390 U.S. at 232; *Marcus*, 317 U.S. at 541-42.

The purpose of the FCA is to "protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the Government instrumentality upon which such claims were made. *Neifert-White*, 390 U.S. at 233 (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). Thus, the FCA covers all claims to Government money, even if the claimant does not have a direct connection to the Government.

For instance, in *Marcus*, the Court held that a collusive bidding process by contractors employed by a local government to work on Public Works Administration projects could give rise to a claim under the FCA. 317 U.S. at 543. Although the workers contracted with the local government rather than the United States and were paid by the local

authorities, the fact that the funds for the project derived from the federally-funded Public Works Administration meant that the FCA applied. The Court focused on the federal money being used to pay the fraudulent claims rather than the presence of a local intermediary. *Id.* at 544. Although the Court did not address the issue of whether the claim had to be presented to the Government, *Marcus* was an early indication that the FCA should be construed broadly.

The Court reaffirmed this position in *Neifert-White*, when it held that a "claim" does not merely encompass a claim for payment, but can also include an application for a loan of federal money. 390 U.S. at 231-232. Noting that the case "involves a false statement made with the purpose and effect of inducing the Government immediately to part with money," the Court ruled that the definition of "claim" within the FCA cannot be so narrowly defined. *Id.* at 232. "This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233.

A number of Circuit Courts have followed the Supreme Court's lead in avoiding an overly-narrow construction of the FCA. In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), citing *Marcus* and *Neifert-White*, the Fourth Circuit noted that the FCA should be construed broadly, *id.* at 786, and held that "any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." *Id.* at 788. It set forth a test

for FCA liability contrary to the one established in *Totten*: "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or forfeit moneys due (*i.e.*, that involved a 'claim')." *Id.*

The Third Circuit has come closest to holding that presentment is not required under the statute. In *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966), a post-*Marcus* / pre-*Neifert-White* case, the court upheld a finding of liability under the FCA for claims submitted to a private corporation that received funding from the Government. *Id.* The key issue for the court was that the funds used to pay the claimant originated with the Government. *Id.* This alone was sufficient to find liability under the FCA. "We have no doubt that the False Claims Act covers such an indirect mulcting of the government." *Id.*

Restrictively construing the FCA, as Petitioners do, is at odds with the FCA's plain text, legislative history, policy rationales, and this Court's precedent.

II. WHY *TOTTEN* DOES NOT APPLY.

A. The *Totten* Decision.

The district court in the instant case relied on the D.C. Circuit's decision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005), and ruled

that liability under the FCA § 3729(a)(2) required a showing that a false record was *presented to the government*, either by the defendants or by the prime contractor.

The issue in *Totten* was whether the submission of a false claim to Amtrak, which Amtrak paid with funds including federal grant money, violated the FCA. The court, with a dissent by U.S. Circuit Judge Merrick Garland, held that it did not because Amtrak was a federal grantee, not part of the Government, and liability under the FCA is contingent upon a showing that the false claim was "presented to an officer or employee of the Government." 380 F.3d at 490.

To reach this conclusion, the court first noted the plain language of FCA § 3729(a)(1) requiring presentment to the Government. *Id.* at 497. The court next held that subsection (a)(2) also contains a presentment requirement. Though the presentment language is not present in subsection (a)(2), the majority reasoned that because the two sections were previously part of the same clause, subsection (a)(2) must be read in conjunction with the presentment language in subsection (a)(1). *Id.* at 499-500.

The court read the "by the government" language in FCA § 3729(a)(2), which was added as part of the 1986 amendments, as referring back to the presentment language in subsection (a)(1), *id.* at 499, despite the fact that these clauses are disjunctive and a litigant need only satisfy subsection (a)(1) or (a)(2) to prove an FCA violation.

See 31 U.S.C. § 3729(a). The court also read this language as limiting the reach of FCA § 3729(c). *Id.* at 499. By adding the clause, the court reasoned, "Congress was reinforcing – rather than abandoning – the distinction between the Government and its grantees that might otherwise have been blurred by the addition of Section 3729(c)." *Id.* The court thus concluded that any claim brought under the FCA requires evidence that an actual claim was presented to the Government before liability can attach. *Id.* at 502.

B. How the *Totten* Court Misinterpreted and Misapplied the FCA.

The *Totten* court misinterpreted the FCA for several reasons. First, the plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented directly to the Government to be actionable. Congress could have chosen to include the presentment language of subsection (a)(1) in other parts of the FCA and did not. The Supreme Court has consistently counseled against attributing the same meaning to different language in the same statute. *See Barnhart*, 534 U.S. at 452 ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Moreover, reading presentment into subsection (a)(2) would give it almost the same

meaning as subsection (a)(1), rendering the latter largely superfluous. *See Totten*, 380 F.3d at 507 (Garland, J., dissenting). The "cardinal principle of statutory construction," however, is "to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal citations, quotations, and alterations omitted). The FCA should not be read so as to make the meanings of subsections (a)(1) and (a)(2) indistinguishable. *Id.*

The *Totten* majority reasons that the opposite reading – that subsection (a)(2) does not have a presentment requirement – would make the presentment requirement in subsection (a)(1) "largely meaningless." *Totten*, 380 F.3d at 501. *See also* Pet. Br. at 19. Why, the *Totten* majority asks, would any plaintiff bring a claim under subsection (a)(1) when she could just use the more lenient subsection (a)(2) for all claims? 380 F.3d at 501. *See also* Pet. Br. at 22. The answer is because subsection (a)(2) contains its own, more burdensome requirement: the claim must have actually been paid. This is not an element of all FCA violations under § 3729(a). As the Supreme Court and other courts have held, an individual can be liable under the FCA for presenting a fraudulent claim to the Government, even if the Government discovers the fraud in time and does not actually pay out any money. *See Rex Trailer Co. v. United States*, 350

U.S. 148, 153 & n.5 (1956); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).[6]

In holding that § 3729(a)(2) contains a presentment requirement, the *Totten* court answers a question it was not asked. Indeed, the Sixth Circuit described the *Totten* analysis as a mere "afterthought," which was "not so much a *ruling* on the meaning of subsection (a)(2) as a *response* to the arguments made by the dissent on an issue not raised by the parties." *Thacker*, 471 F.3d at 618. In making this unnecessary response, the majority seems to have misread the plain language of the statute and its legislative history.

The primary issue before the court in *Totten* was whether claims submitted to Amtrak, a federal grantee receiving a portion of its funds from the Government constituted presenting a claim "to the Government." *Totten*, 380 F.3d at 490. There is no discussion of what it means to "present" a claim, and it is unclear from the opinion whether any evidence was put forth that the money used to pay the defendants came from the Government (rather than from non-government funds). *See id.*

As the majority points out, during six years of litigation, none of the parties argued that subsection (a)(2) provided separate grounds for relief, and the

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[6] Contrary to the district court's opinion in the instant matter and Petitioners' argument, *Rivera* does not stand for the proposition that a claim must be presented to the government in order to be actionable. The court did not address this issue, as the claim at issue in *Rivera* was presented to the government. 55 F.3d at 710.

majority would not have even considered the subsection (a)(2) argument had the dissent not raised it *sua sponte*. *Id.* at 497.

C. Why the Sixth Circuit Was Correct In Rejecting *Totten*.

Petitioners do not hide their disdain for the FCA and "its potentially crippling penalties and provisions for suits by opportunistic 'qui tam relators,'" Pet. Br. at 3 (quotes in original), "seeking draconian penalties of as much as $11,000 per claim." *Id.* at 4. Petitioners characterize these brave whistleblowers as "bounty-hunting relators looking for windfalls even where the Government has suffered no fraud directed against it." *Id.* at 6.

Petitioners mischaracterize the Sixth Circuit's decision as turning "ordinary contract disputes," *id.*, and "fraud perpetrated by one private party against another," *id.* at 33, into actionable FCA cases. Petitioners raise the specter that "[t]he Sixth Circuit's rule 'would make the potential reach of the Act almost boundless,' as every transaction with any entity receiving federal funds would potentially be subject to the FCA." Pet. Br. at 3 (quoting *Totten*, 380 F.3d at 496) (emphasis added)).

That is not what the Sixth Circuit said. The Sixth Circuit and the FCA are concerned only with false or fraudulent claims that "will be paid with government funds." 471 F.3d at 615. The Sixth Circuit never held, or even suggested, that a non-false or non-fraudulent claim for non-federal money

(even if submitted to an entity that receives some federal funding) is actionable under the FCA.

Yet Petitioners persist in their hyperbole and hypotheticals:

> Companies doing business with federal contractors and grantees may find that what used to be only a private dispute about contract requirements can be turned into a full-scale government investigation of improper claims, courtesy of an opportunistic relator eager to recover up to 30% of any award under the FCA.

Pet. Br. at 8. However, in the case at bar, the Navy ordered generator sets of an exacting quality – which requirements were flowed down to and imposed on Petitioners – to provide electrical power needed for guided missile destroyers. Petitioners received hundreds of millions of taxpayer dollars, all from the U.S. Treasury, in exchange for the agreements to build the generator sets according to certain contract specifications.

Petitioners knew they were working on a Navy contract funded by federal dollars, and that the Navy's funds used to pay the Petitioner subcontractors did not magically become "private" funds just because they were disbursed by the prime contractor shipyards. The public funds used to buy the Navy's generator sets were never "private" funds belonging to the shipyards. Petitioners did not make claims for "private" funds, did not violate "private" contract specifications regarding construction of the

generator sets, and did not perpetrate fraud against "private" prime contractor shipyards. By violating the Navy's quality requirements and producing defective generator sets, Petitioners injured the Navy even though they were not in direct privity with the Navy. *United States v. Bornstein*, 423 U.S. 303, 313 (1976) (holding that FCA actions must concentrate on the conduct of the actual wrongdoer.)

The Sixth Circuit recognized that, the district court, by relying on *Totten*, "held that liability under the FCA required a showing that a false or fraudulent claim was *presented to the government*, either by the defendants or by the prime contractor." 471 F.3d at 614 (emphasis in original). But the Sixth Circuit specifically rejected this restrictive view of the FCA.

Petitioners' main hypothetical – in which the Government bankrolls the prime contractor via a firm-fixed-price contract (and therefore if a subcontractor overcharges the prime contractor, any additional funds improperly paid to the subcontractor will come out of the prime contractor's pocket), Pet. Br. at 10-12 – may present a situation in which the Government is unable to establish the required causal connection because it cannot prove presentment. However, that inability to prove a particular type of claim factually without proof of presentment does not mean that, as a matter of law, presentment is required as an element of all claims under subsection (a)(2). Alternatively, the payment with Government funds (although already in the hands of the prime contractor) might permit the inference that the claim had been paid by the

Government. The flaw in the case would be the omission of the proof of causal connection, *i.e.*, a showing that the false statement was used "to get" the claim paid.

Petitioners' second example of a prospective payment system (Pet. Br. at 12-13), such as Medicare, based on predetermined national and regional rates, suffers from the same flaw. The problem of whether a relator has presented sufficient proof of causal connection is an evidentiary question. Petitioners have characterized what is a problem of adequacy of proof in various hypothetical contexts as a question of statutory interpretation. Ironically, if "presentment" is added to subsections (a)(2) and (a)(3), decades of successful health care fraud prosecutions under the FCA would be profoundly restricted, especially in the case of false claims submitted to Medicare. Those claims would no longer be actionable because they are not "presented" to the Government, but rather to private intermediaries – usually insurance companies – which are subsequently reimbursed by the United States. *See Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975), *cert. denied*, 423 U.S. 830 (1975) (holding that claims submitted to intermediaries under Medicare and Medicaid are claims to the United States under the False Claims Act.).

The plain meaning, legislative history, and policy rationale of the FCA, as well as the Supreme Court's history of avoiding an overly-narrow construction of the Act, dictate that the decision of the Sixth Circuit should be affirmed. *Thacker* does not impose "'boundless' liability on anyone who

touches any funds traceable to the federal Government." Pet. Br. at 13. In fact, under the current prevailing law in the lower courts, "[n]o damages need to be shown in order to recover the penalty" under the FCA. *Rex Trailer*, 350 U.S. at 153 n.5 (1956)).

Petitioners' transparent contempt for the FCA is obvious and their disagreement is not really with the Sixth Circuit's opinion, but with the law Congress enacted as its primary tool to combat "fraud against the Government." *Rainwater*, 356 U.S. at 592.

CONCLUSION

For the reasons set forth above and by the Respondents, the decision of the Sixth Circuit Court of Appeals that presentment evidence is not required for subsection (a)(2) and (a)(3) of the FCA should be affirmed as a matter of law.

Respectfully submitted,

Alan M. Grayson
(*Counsel for Amicus Curiae*)
Victor A. Kubli
Jesselyn A. Radack
GRAYSON & KUBLI, P.C.
8605 Westwood Center Drive
Suite 410
Vienna, VA 22182
(703) 749-0000

Counsel for *Amicus Curiae*

AMICUS CURIAE BRIEF

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35pgs

No. 07-214

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC. ET AL.,
Petitioners.

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICUS CURIAE PROFESSOR JOEL D. HESCH IN SUPPORT OF RESPONDENTS

Joel D. Hesch
Liberty University School of Law
1971 University Boulevard
Lynchburg, VA 24502
(434) 592-4251

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DISTRICT COURT REACHED A WRONG CONCLUSION BECAUSE IT BEGAN WITH THE WRONG PREMISE THAT A CLAIM HAD NOT BEEN SUBMITTED TO THE GOVERNMENT. . 4

II. THIS COURT SHOULD ADOPT A THREE-STEP STANDARD FOR DETERMINING WHETHER SPECIFIC CONDUCT VIOLATES THE FCA 11

A. Step One: Were the Payments "Federal Funds"? 13

1. *The moneys paid to Petitioners were federal funds*.. 13

2. *The same analysis applies where the government front-loads money*. ... 16

3. *The proposed standard would not reach the worst case hypothetical examples raised in amicus curiae briefs in support of Petitioners.* 17

B. Step Two: Did the Person Know it was Falsely Seeking, Obtaining, or Retaining Federal Funds? 21

C. Step Three: Which Section of 3729(a)(1)-(7) was Violated? 23

1. *Section 3729(a)(1) applies.* 26

2. *Section 3729(a)(2) applies.* 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **Page(s)**

Costner v. URS Consultants, Inc.,
153 F.3d 667 (8th Cir. 1998) 21

Hutchins v. Wilentz, Goldman, & Spitzer,
253 F.3d 176 (3d Cir. 2001) 21

In re Columbia Gas Sys., Inc.,
997 F.2d 1039 (3d Cir. 1993) 15

In re Penn Cent. Transp. Co.,
486 F.2d 519 (3d Cir. 1973) 16

Rockwell v. United States,
127 S. Ct. 1397 (2007) 1, 2

United States v. Bornstein,
423 U.S. 303 (1976) 7, 9, 26, 27

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 9, 10, 11

United States ex rel. Schmidt v. Zimmer, Inc.,
386 F.3d 235 (3d Cir. 2004) 10, 26, 27

United States ex rel. Totten v. Bombardier Corp.,
380 F.3d 488 (D.C. Cir. 2004) 2, 6

United States v. Krizek,
111 F.3d 934 (D.C. Cir.1997) 10

United States v. Mackby,
261 F.3d 821, 827 (9th Cir. 2001) 10

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 23

Peterson v. Weinberger,
508 F.2d 45, 52-53 (5th Cir. 1975) 10

United States v. Rachel,
208 Fed. Appx. 236 (4th Cir. 2006) 10

United States v. Southland Mgmt. Corp.,
326 F.3d 669 (5th Cir. 2003) 21

United States v. Taber Extrusions, LP,
341 F.3d 843 (8th Cir. 2003) 10

STATUTES

31 U.S.C. § 3729(a)(1) ..... *passim*

31 U.S.C. § 3729(a)(2) ..... *passim*

31 U.S.C. § 3729(a)(3) 5, 24, 25

31 U.S.C. § 3729(a)(4) 24

31 U.S.C. § 3729(a)(5) 24, 25

31 U.S.C. § 3729(a)(6) 25

31 U.S.C. § 3729(a)(7) 23, 25

31 U.S.C. § 3729(b) 12, 21, 22

31 U.S.C. § 3729(c) 11

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Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U.L. Rev. 111 (2006) . 1

Joel D. Hesch, *Whistleblowing: A Guide to Government Reward Programs* (2008) 1

INTEREST OF AMICUS CURIAE[1]

Joel D. Hesch is a professor at Liberty University School of Law and an expert on the False Claims Act (FCA).[2] He is the author of a recent book[3] and scholarly article,[4] and writes a weekly media column.[5]

For more than fifteen years, between 1990 and

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission.

[2] 31 U.S.C. §§ 3729-31.

[3] *Whistleblowing: A Guide to Government Reward Programs* (2007).

[4] Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U.L. Rev. 111 (2006)(cited 5 times in an amicus brief to this Court in *Rockwell v. United States*, 127 S. Ct. 1397 (2007)).

[5] *Whistleblowing* is a column published by WorldNetDaily.com. Each week, Mr. Hesch highlights a different aspect of fraud against the government and otherwise comments about the use of the FCA to combat fraud. His articles are located at http://wnd.com/news/archives.asp?AUTHOR_ID=285.

2006, Professor Hesch worked as a Trial Attorney in the Civil Fraud Section of the Department of Justice (DOJ), where he conducted nationwide FCA investigations affecting twenty different government agencies. While at DOJ, he worked on cases recovering more than $1 billion, including the trial aspects of *Rockwell v. United States*, 127 S. Ct. 1397 (2007), as well as FCA proceedings against subcontractors.

Professor Hesch offers his scholarship and unique FCA experiences to aid this Court in establishing a standard for the courts to use in evaluating whether the FCA is violated and applying it to the instant case.

SUMMARY OF ARGUMENT

Because the lower courts lack a standard for addressing whether a defendant is liable under the FCA, there is an increasing level of inconsistency in the developing case law under this important federal statute. In particular, the lack of a standard led the district court and Sixth Circuit to needlessly address whether Sections 3729(a)(2) and (3) of the FCA contain a requirement that a claim be presented to the government, based upon the rationale identified in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). This issue does not apply to this case any more than it would to any other FCA case against a government prime or subcontractor. Specifically, the *Totten* issue factually arises only in an entirely different type of case than this one, such as front-loading money under a federal

grant. That is because government contracting cases, including this one, always involve claims being presented to the government for payment.

This brief proposes the following three-step standard, which will lead to uniform results consistent with the purpose of the FCA:

> *(1) Are the funds "federal funds?" If no, the FCA does not apply. If yes, proceed to question two.*
>
> *(2) Did the person knowingly make or use a false statement or claim to seek, obtain, or retain such federal funds? If no, the FCA does not apply. If yes, proceed to question three.*
>
> *(3) Which one or more of the seven provisions contained in Section 3729(a)(1)-(7) apply?*

This case presents a perfect scenario for applying the proposed standard. If it had been used by the district court or the Sixth Circuit, this case would never have reached this appeal and the case would have been resolved years ago.

In this case, the district court bypassed the issues addressed in the first step and totally skipped over the issues addressed in the second step. It also began with a wrong premise when addressing the issues in the third step. Therefore, it was inevitable that the district court would reach a wrong result. Specifically, the district court reached as its ultimate conclusion that the FCA does not apply to a classic

case of subcontractor fraud. Such a result is contrary to holdings by this Court and every Circuit Court of Appeals that has addressed the issue.

The Sixth Circuit also would have benefitted from the proposed standard. Without this standard, it attempted to fix the wrong conclusion without first addressing the incorrect root premises that led the district court to improperly dismiss the case in the middle of trial.

In the process of applying the facts of this case to the proposed three-step standard, this brief demonstrates that the record contained significant evidence to establish that claims had been submitted to the Navy for payment. This brief also establishes that if the three-step standard is followed by the courts, there is no need to inject into Sections 3729(a)(2) and (3) a requirement that a claim be presented to the government.

Accordingly, this Court should affirm the Sixth Circuit's reversal of the district court's dismissal of the case, but remand the case back to the district court to apply the proposed three-step standard.

ARGUMENT

I. THE DISTRICT COURT REACHED A WRONG CONCLUSION BECAUSE IT BEGAN WITH THE WRONG PREMISE THAT A CLAIM HAD NOT BEEN SUBMITTED TO THE GOVERNMENT.

This case centers upon allegations that the Petitioners, as subcontractors, knowingly delivered

defective parts, known as Gen-Sets,[6] to their prime contractor for use in building $1 billion Navy ships. CA App. 317.[7] It is alleged that Petitioners violated three separate liability provisions of the FCA: (1) by causing the prime contractor to submit false claims to the Navy under 31 U.S.C. § 3729(a)(1); (2) by causing the prime contractor to use false records or statements to get false claims paid under Section 3729(a)(2); and (3) by conspiring to defraud the government under Section 3729(a)(3).[8] JA 94a-96a.

The district court noted in its opinion that the plaintiffs contended that the Petitioners, as subcontractors, caused the prime contractor to present claims to the Navy. Pet. App. 40a-41a, 56a-59a. The district court, however, refused to accept that the prime contractor presented claims for payment to the Navy, based solely upon the fact that the invoices of the prime contractor were not introduced into evidence at trial. *Id.* at 56a-59a.

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[6] Pet. App. 3a-4a. The government was required to pay approximately $3 million for each of the 150 Gen-Sets that would be used in the Navy ships. JA 40a-41a; CA App. 638-54, 914-53.

[7] Citations to the parties' Joint Appendix in this Court are "JA." Citations to the Petition for Certiorari Appendix are "Pet. App." Citations to Petitioners' Merit Brief are "Pet. Br." Citations to the parties; joint appendix in the Sixth Circuit are "CA App."

[8] This brief does not address the merits of the conspiracy count.

Therefore, at the conclusion of plaintiffs' case at trial, the district court dismissed the entire case.

It dismissed the first count under Section 3729(a)(1), because that provision explicitly contains a requirement that a claim be presented to the government. *Id.* Next, it relied upon *Totten* to dismiss the counts under Sections 3729(a)(2) and (3) by holding that these FCA provisions contain an "implicit" requirement that a claim be presented to the government. *Id.* at 47a-56a.

By starting with the wrong premise that no claim had been presented to the Nave, a wrong conclusion was inevitable. As demonstrated below, claims were presented to and paid for by the Navy.

The Respondents, as Relators[9] in this declined *qui tam* case, made a decision not to introduce at trial any of the hundreds of invoices the prime contractor presented to the Navy. That does not mean, however, that claims had not been submitted to the Navy. Nor does it mean that there was no evidence in the record that claims were presented to and paid for by the Navy.

The focus of this FCA case is upon the conduct of the Petitioners, as subcontractors, and their invoices, not those of the prime contractor. The Respondents introduced at trial all of the invoices the subcontracting Petitioners provided to the prime contractor, which they caused to be passed on to the

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[9] Under the FCA, a private person, known as a "relator," may bring a *qui tam* action "in the name of the Government." 31 U.S.C. § 3730(b).

government.[10]

The Relators' decision to introduce evidence other than the prime contractor's invoices to establish that claims were presented to the Navy is supported by *United States v. Bornstein*, 423 U.S. 303, 309-13 (1976). In that case, this Court ruled that the number of civil penalties imposed in a FCA case against a subcontractor is not based upon the invoices of the prime contractor, but rather the invoices of the subcontractor provided to the prime contractor. *Id.* This Court noted that the focus in a FCA subcontractor fraud case is "upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313.

In this case, to support its assertion that claims had been submitted to the Navy, the Respondents introduced the government contract, which outlined the terms and conditions of payment and the procedures for submitting invoices. CA App. 410-15. Like most government contracts, the prime contractor was required to submit regular bills to the government as work was completed.

The district court quoted portions of one key provision of the contract:

> The Contractor shall certify on each invoice:

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[10] Summaries of the invoices are located at CA App. 914-953 (Allison), 966-994 (General Tool invoices to Allison), 837-854 (SOFCO invoices to General Tool). The amounts from these invoices were included in invoices the prime contractor submitted to the government.

> (1) the percentage of physical progress in the performance of work on the vessel as a decimal carried to four places; and
> (2) the allowable cost incurred in the performance of the work on the vessel as of the date the invoice is submitted.

Pet. App. 58a. The same clause also defined "incurred costs" as follows:

> 'Incurred Costs' are those costs identified through the use of the accrual method of accounting, as supported by the records maintained by the Contractor and which are allowable ... and include only: (1) Costs for items or services purchased directly for the contract which are paid as well as incurred, as shown by payment made by cash, check, or other form of actual payment....

CA App. 413. In addition, the government contract permitted the prime contractor to submit invoices every two weeks. *Id.*

Thus, the Navy did not front-load money to the prime contractor. Rather, the prime contractor billed the Navy every two weeks for work that had been performed under the contract–either by it or its subcontractors. In other words, the Navy contract dictated that government payments can *only* be made *after* the prime contractor presents claims which are based upon costs which had been incurred and are conforming to the contract. CA App. 411-13. Therefore, it would be unlawful for the Navy to pay

for work performed by the Petitioners, as subcontractors, prior to them submitting invoices to the prime contractor to be presented to the Navy.

Petitioners have never contended that the Navy front-loaded payments under the government contract; nor could they. During trial, one of the Petitioners' project engineers provided testimony confirming the process whereby Petitioners, as subcontractors, submitted bills to the prime contractor, the prime contractor submitted bills to the Navy, the Navy paid the bills, and the prime contractor passed the funds on to the Petitioners. JA 107a-112a.

The district court also acknowledged that the Respondents offered circumstantial evidence to support its contention that claims were presented to the Navy; namely that "the ships were continuing to be built." Pet. App. 58a. In other words, unless invoices had been submitted and paid, the prime contractor would have stopped performing work. As is true in government contracting, the prime contractor did not wait to tender a fully completed $1 billion ship before seeking any progress payments. Accordingly, the record demonstrates that the prime contractor did present claims to the Navy.

There could not be a more classic example of a valid use of Sections 3729(a)(1) and (2) than in a subcontractor fraud setting, such as the instant case. In fact, the Supreme Court and every Circuit Court of Appeals that has addressed the issue has ruled that the FCA applies to those without a direct contract with the government, including subcontractors, because they cause another to submit claims to the

government. *Bornstein*, 423 U.S. at 309-13; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943)(The FCA provisions "indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government."); *United States v. Rachel*, 208 Fed. Appx. 236 (4th Cir. 2006)(no direct contract is required to be liable under the FCA); *United States v. Taber Extrusions, LP*, 341 F.3d 843, 845 (8th Cir. 2003)("Without question, the first three subsections of 31 U.S.C. § 3729(a) are broad enough to 'reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.'")(citing *Hess*, 317 U.S. at 544-45); *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 242-44 (3d Cir. 2004)(reversing the district court's dismissal of FCA claims against subcontractor); *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001)("The FCA reaches 'any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.'")(citing *Hess*, 317 U.S. at 544-45); *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir.1997)(holding that a doctor was liable for false claims prepared by his wife, where he "delegated to his wife authority to submit claims on his behalf" and utterly failed to review the false submissions); *Peterson v. Weinberger*, 508 F.2d 45, 52-53 (5th Cir.

1975)("These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.")(citing *Hess*, 317 U.S. at 544-45).

As evidenced by the wrong approach used by the lower courts in this, and many other cases, when analyzing whether a defendant violated the FCA, there is a great need for this Court to provide guidance to the lower courts to follow when evaluating FCA cases. The next section proposes a model for this Court to adopt. The following sections apply the model to this case and also address the issue of whether the FCA contains an implicit requirement that a claim be submitted to the government.

II. THIS COURT SHOULD ADOPT A THREE-STEP STANDARD FOR DETERMINING WHETHER SPECIFIC CONDUCT VIOLATES THE FCA.

The manner in which the FCA is drafted lends itself to a three-step analysis for determining whether any specific conduct violates the FCA.

The first hallmark of the FCA is that it protects the flow of federal funds. The FCA broadly defines a "claim" to capture all forms of requests for payments, including demands made to a contractor or grantee, if the government provided any portion of the money. 31 U.S.C. § 3729(c). In other words, the FCA applies

where federal money is used to fund a government contract, program, or grant. On the other hand, the FCA does not apply to situations where purely private funds are involved, such as Enron, where stockholders were defrauded. Thus, a proper approach to analyzing the FCA begins with determining whether the funds at issue are federal funds.

The FCA is not intended to reach every instance of payment of federal funds. Rather, a second hallmark of the FCA is that a person must possess scienter or guilty knowledge that its statements or claims were false. The FCA does not apply to honest disputes, but only where a person had actual knowledge of falsity or if he acted with either "deliberate ignorance," or "reckless disregard" for the truth or falsity of the information. 31 U.S.C. § 3729(b). Therefore, the second step is to determine if the claims were false and the person had knowledge of such falsity.

The third and final step in the liability analysis is for a court to identify which one or more of the seven overlapping substantive provisions apply from Section 3729(a)(1)-(7).[11]

Accordingly, this brief proposes that courts apply the following three-step standard for determining whether a defendant's conduct violated the FCA:

(1) Are the funds "federal funds?" If no, the

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[11] The requirements of these sections will be discussed when addressing the third step.

FCA does not apply. If yes, proceed to question two.

(2) Did the person knowingly make or use a false statement or claim to seek, obtain, or retain such federal funds? If no, the FCA does not apply. If yes, proceed to question three.

(3) Which one or more of the seven provisions contained in Section 3729(a)(1)-(7) apply?

Beneath this approach lie real and concrete standards that foster efficiency and lead to more uniform results. The next sections flesh out these standards in the context of this case.

A. Step One: Were the Payments "Federal Funds"?

The first question a court must ask is whether the money is federal funds. If not, the FCA does not apply regardless of whether fraud occurred. Because courts tend to skip over this analysis, it often leads to wrong results.

In the next section, the facts of this case will be applied to step one. It will also discuss how this standard would apply if the government had front-loaded a grant, as well as its application in the context of the worst case hypothetical examples raised in the amicus curiae briefs of the Chamber of Commerce and the Washington Legal Foundation.

1. *The moneys paid to Petitioners were federal funds.*

Petitioners wrongly equate the fraud committed by themselves, as subcontractors, in delivering non-conforming parts under a government contract as a matter solely between two private parties–itself and the prime contractor. (Pet. Br. at p. 3.) Apart from relying on the erroneous holding by the district court that claims had not been presented to the Navy, the Petitioners do not support their suggestion that the funds were private funds.

As established above, the prime contractor's claims were presented to and paid by the Navy. Therefore, it cannot be contested that Navy payments to the prime contractor constituted federal funds.

The fact that the prime contractor passed along the federal funds to its subcontractors does not alter that the moneys were federal funds at the time the government was asked to pay and did pay the prime contractor's invoices.

Here, it is alleged that the Petitioners violated the FCA by *causing* the prime contractor to submit false claims to the Navy. As a matter of law, a violation of Section 3729(a)(1) occurs at the time a claim by the prime contractor is presented to the Navy. Similarly, a violation of Section 3729(a)(2) occurs at the moment of payment of funds from the Navy to the prime contractor.

Accordingly, violations of both of these two FCA provisions occurred by the time payment was made by the Navy to the prime contractor. Thus, step one is satisfied and the Court should proceed to the

second step of the standard, which asks whether the claims were false and the person knew they were false.

Before addressing step two, however, this brief explores whether the money remained federal funds at the time the Petitioners *received* payments from the prime contractor. Even though it would not be appropriate to do so in this case because the FCA violations occurred, at the latest, at the point of payment by the Navy to the prime contractor, the analysis of this question is useful for examining how step one would be applied in a case where federal funds are front-loaded, such as in a typical federal grant setting.

Here, the money would still constitute federal funds at the time of *receipt* by Petitioners. That is because the government retains title to or a lien upon the funds until the work being billed was conforming to the contract.

The payments made by the Navy were "conditional." The Navy contract stated that payments were conditioned upon the claimed costs being both incurred and allowable.[12] CA App. 410-15.

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[12] The contract also gave the Navy the right to audit the invoices: "Certifications and Audits. At any time or times prior to final payment under this contract, the Contracting Officer may have any invoices and statements or certifications of costs audited. The Contracting Officer may require the Contractor to submit, or make available for examination by the Contracting Officer or his designated representative, the supporting documentation upon which invoices, statements or

Because the conditional payments required that conforming goods be delivered, there existed a form of an "implied trust" or "equitable lien" upon the federal funds. *Cf. In re Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1056 (3d Cir. 1993)("Federal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient."). The lien or trust on the funds only extinguishes once the work was both complete and conforming to the requirements.

If the Gen-Sets do not conform to the contract requirements, the mere invoicing or transmittal of funds would not extinguish the government's title or lien. Accordingly, transmittal of funds to the prime contractor would not extinguish the government's interest in or title to the federal funds if the Gen-Sets are non-conforming. Therefore, even at the time when the money was received by the Petitioners, it would constitute federal funds–assuming the Respondents establish that the Gen-Sets did not conform to the contract.

2. *The same analysis applies where the government front-loads money.*

The same analysis extends to situations where the government front-loads money to an entity under a contract or grant to perform a federally funded project. The government retains an interest in the funds until its purposes are satisfied. This is a form

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certifications of costs are based." CA App. 414.

of an implied trust even without express language in an agreement. *In re Penn Cent. Transp. Co.*, 486 F.2d 519, 524 (3d Cir. 1973)("When the language of the parties fails to clearly indicate their intention, it may be ascertained by other objective manifestations of intent, such as the facts and circumstances surrounding the transaction and the relationship of the parties."). For instance, if the entity canceled its project immediately after receiving grant funds, it would not be able to simply keep the federal funds.

The goal and role of the FCA is to protect the flow of federal funds. Title to the funds is not extinguished until the purpose for which the funds were provided is met. Only once the funds are spent on a purpose for which the funds were intended and the work satisfactorily conforms to the project is the implied trust satisfied.

Thus, even if the government front-loads funds, the money is still considered federal funds until the money is spent for conforming purposes.

3. *The proposed standard would not reach the worst case hypothetical examples raised in amicus curiae briefs in support of Petitioners.*

Two of the amicus curiae briefs in support of the Petitioners each raise two hypothetical cases where they suggest that the FCA would be stretched beyond its purposes unless this Court reads into Section 3729(a)(2) limiting language that the claim be presented directly to the government. All four hypothetical situations, however, are strawman

arguments. Notwithstanding that none of these situations have ever been the subject of a FCA action, they would not satisfy the proposed three-step standard regardless of whether the Court imposes a requirement that the claim be presented to the government.

The amicus curiae brief of the Chamber of Commerce suggests as its two worst case scenarios that Section 3729(a)(2) of the FCA will be improperly applied in a government firm-fixed price contract setting where a subcontractor overcharges a prime contractor for goods which are conforming to the contract or in a Medicare setting where a supplier overcharges a hospital receiving a fixed amount under the prospective payment system for a particular procedure or test.[13] (Chamber of Commerce Brief at 11-14.)

In firm-fixed price settings, such as the two raised by the Chamber of Commerce, the government has agreed to pay a set price for conforming goods or services. It does not matter to the government how

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[13] For example, the government agrees to pay a fixed price of $100 for a contractor to deliver a widget. The contractor obtains the widget from a vendor for $80. The widget is conforming to the contract and the government pays $100. It turns out that the vendor should have charged the contractor $75, but lied about its costs. The Chamber of Commerce suggests that the government might sue the supplier for the $5 it defrauded the contractor. The FCA would not permit such an action regardless of whether the FCA contains a requirement that the claim be presented to the government.

much it costs the prime contractor or hospital to make or acquire the goods or services. Once a conforming good or service is tendered, the government's lien or title to the funds is extinguished. Therefore, the funds paid to the subcontractor or vendor would not constitute federal funds and the FCA would not apply to these hypothetical examples.

The Chamber of Commerce carefully chose its hypothetical examples to consist of examples where the goods and services were (1) conforming to the contract, and (2) the government contract was a fixed-price setting. The Chamber of Commerce does not suggest that it would be improper or unfair for the subcontractor or vendor to be liable under the FCA if the goods were nonconforming or if the contract price was a "cost" basis. Under those circumstances, the subcontractor or vendor would have *caused* a false claim to be submitted to the government by asking the prime contractor or hospital to seek increased payments based on fraudulent data or payments for non-conforming goods. Moreover, in those situations, a claim would have been submitted to the government and therefore fall outside the context of the discussion of whether Section 3729 (a)(2) contains an implicit requirement that the claim be presented.

The Washington Legal Foundation raises its own worst case hypothetical examples by suggesting that under the Sixth Circuit's opinion the FCA might apply anytime a Social Security beneficiary or a federal employee is defrauded with its personal funds because the money originated from the federal

government.[14] (Washington Legal Foundation Brief at p. 6.) This argument suggests that if a federal employee deposits its salary into the bank and then uses these funds to hire someone to remodel his home, the Department of Justice would sue the carpenter for triple damages if he cheated the employee by not performing the work on the employee's private dwelling. Again, this argument misunderstands what constitutes federal funds.

The government's title or lien upon the funds it pays to a beneficiary or federal employee does not flow ceaselessly, but is extinguished upon payment. Thus, at the moment of payment, it ceases to be federal funds. The purpose of the payment to a Social Security beneficiary was to provide funds to a person eligible for the benefit, and the purpose of the payment to a federal employee was to pay for work performed. In these hypothetical examples, both the beneficiary and employee were entitled to the payments. Therefore, the lien or interest on the funds extinguished once the federal funds were paid. Accordingly, the FCA would not apply to these

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[14] It suggested as its third and final example a situation where a subcontractor cheats a prime contractor, but the prime contractor is not entitled to submit costs for that work to the government. (Brief at 7.) This example is the same as one raised by the Chamber of Commerce, i.e. a fixed price setting where the amount charged by a subcontractor to the prime contractor is not part of the agreement to perform work under a federally funded program or project. For the reasons discussed above, this example would not be governed by the FCA.

hypothetical examples regardless of whether there was a requirement that the claim be presented to the government.

B. Step Two: Did the Person Know it was Falsely Seeking, Obtaining, or Retaining Federal Funds?

The second step, determining whether the person knew the claim was false, actually involves answering two related questions: Was the claim false, and if so, did the person know it was false?

This step is critical, because the FCA applies only if a person had requisite scienter or guilty knowledge that it was falsely seeking, obtaining, or retaining federal funds. 31 U.S.C. § 3729(b). The FCA does not seek to reach every instance of payment of federal funds. Rather, the FCA only applies if the person not only was not entitled to the federal funds, but he knew it.

First, a claim is deemed false, as a matter of law, when a request is made for funds to which the person is not entitled. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003)(a false claim means a claim for money or property to which a defendant is not entitled); *Hutchins v. Wilentz, Goldman, & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001)("we hold the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not in the purview of the False Claims Act"); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)("Only those actions by the claimant ...

[calculated to] cause the United States to pay out money it is not obligated to pay ... are properly considered 'claims' within the meaning of the FCA.").

This standard does not depend upon the knowledge of the person presenting the claim. Rather, it is a pure legal recognition that a claim is false when it seeks costs for something not allowed.

The second prong in this step addresses whether the person knew the claim was false. The FCA defines guilty knowledge not only as actual knowledge of falsity, but also includes situations where he acted with either "deliberate ignorance" or "reckless disregard" for the truth or falsity of the information. 31 U.S.C. § 3729(b).

If both of these conditions are satisfied, the court would move to step three. If either is missing, the FCA case should be dismissed.

Here, the district court short-circuited the process by dismissing the case before the defendants presented their case. Accordingly, a jury did not have an opportunity to decide whether the Gen-Sets complied with the contract specifications, rendering the claim false, and if the Petitioners had such guilty knowledge at the time it asked the prime contractor to submit its claims to the Navy for payment. Accordingly, this step still needs to be determined by the district court.[15]

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[15] The district court indicated that even if the claims had been presented, the entire case might still need to be dismissed because it viewed the FCA as requiring that claims be certified. There are two errors with this

C. Step Three: Which Section of 3729(a)(1)-(7) was Violated?

At step one in the proposed standard, it would have been established that the funds were federal funds. At step two, it would have been established that a person's claim was false and that he knew it at the time. The third and final step is to identify which one or more of the seven substantive provisions from Section 3729(a)(1)-(7) apply to the false statements or claims.

When Congress enacted the FCA, it intended to capture every possible manner in which a wrongdoer, through a false statement or false claim, could either attempt to obtain, actually obtain, or continue to retain federal funds. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)("[T]he Act was intended

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analysis. First, Section 3729(a)(1) does not require any form of a false statement, much less a certification. This provision imposes liability upon anyone who "causes to be presented" to the government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Second, although (a)(2) is worded differently than (a)(1) by including the language "*use of a false record or statement* to get a false or fraudulent claim paid," it does not mandate that a certification accompany the invoice. *Id.* at § 3729(a)(2). Rather, any false statement would satisfy this provision; it need not be a certification to an invoice. In any event, the contract required the prime contractor to certify in its invoices that the claimed costs were allowable. Pet. App. 58a. This certification satisfies Section 3729(a)(2).

to reach all types of fraud, without qualification, that might result in financial loss to the Government."). That explains why there are seven overlapping, yet distinctive, substantive provisions defining liability under the FCA. *See* 31 U.S.C. §§ 3729(a)(1)-(7). For instance, (a)(1) applies when a person "seeks" federal funds, (a)(2) applies when he "obtains" federal funds, (a)(7) applies if he "retains" federal funds, and (a)(3) applies when he conspires to seek, obtain, or retain federal funds.

In order to accomplish these purposes, it was necessary to build in overlap among the seven provisions. Yet, each of the seven does have distinctive functions or roles.

The first two liability sections of the FCA, Sections 3729(a)(1) and (2), combine to capture most fraudulent schemes. Although they frequently apply to the same misconduct, including two overlapping provisions reduces the risk of unintended loopholes which would likely occur if Congress attempted to draft them to be mutually exclusive.

The primary distinction is that Section 3729(a)(1) includes *attempts* to cheat through its language of submitting a claim "for payment or approval," whereas Section (a)(2) applies only when payment has actually been made, i.e. getting a false claim "paid or approved." 31 U.S.C. §§ 3729(a)(1) and (2).

This *presentment* requirement in Section (a)(1) does not exist in the remaining six provisions of Section 3729(a), because (a)(1) is the only substantive FCA provision which makes a person liable when the claim is not paid and there is no actual damage to the government. The presentment condition acts as a

form of a safety check in situations where civil penalties can be imposed when there is no actual loss to the government.

Next, Section 3729(a)(3) addresses acts of conspiracy, making each co-conspirator liable without having to prove that each individual caused the false claim to be submitted. It has a completely different function from the preceding sections, although a co-conspirator could still also violate Sections (a)(1) or (2).

Sections 3729(a)(4) through (6) are narrowly tailored to address specific, but less frequent, types of fraud. Section (a)(4) reaches situations where a person delivers less property to the government than required. Section (a)(5) addresses the potential that a government employee might receive a kickback to issue a false receipt. Section (a)(6) applies to situations where a person purports to buy excess or unneeded government property when the government official has no authority to sell it.

Finally, Section 3729(a)(7) addresses reverse false claims where a person uses a false statement or record to avoid an obligation to return federal funds or property. For instance, if a contractor receives engine parts for repair and is required to perform an annual accounting of the property in its possession in order to pay for any shortages, it would be a violation of (a)(7) to use a false statement to conceal shortages of parts in the inventory list to avoid the duty to pay for such missing parts.

When viewed together, the intention of these seven provisions is to capture all forms of fraud against the government. There is no injustice

drafting a statute with overlapping provisions because the wrongdoer is only obligated to pay damages once. Rather, it would be an injustice to narrowly read these provisions or inject into any provision beyond Section 3729(a)(1) a requirement that a claim be presented to the government because it would create gaps such that not every instance of fraudulently seeking, obtaining, or retaining federal funds would be covered.

As shown below, at least Sections 3729(a)(1) and (2) apply to this case, provided steps one and two of the proposed standard have been met.

1. *Section 3729(a)(1) applies.*

Section 3729(a)(1) reads:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.

31 U.S.C. § 3729(a)(1).

To establish a prima facie claim under this provision, a plaintiff must show "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *Zimmer*, 386 F.3d at 242 (citation omitted).

In steps one and two, it would have already established above that the money was federal funds, the claims were false, and the Petitioners had

knowledge of the falsity of the claims. The only additional requirement at this third step for liability to attach under (a)(1) is to show that the Petitioners caused the claims to be presented by the prime contractor to the Navy.

Here, the Respondents introduced at trial the false invoices of the Petitioners, the contract describing the invoicing process, and testimony regarding how the subcontractors submitted invoices to the prime contractor. Thus, Petitioners caused the prime to submit false claims to the government. There could not be a more classic example of a case where Section 3729(a)(1) applies. *See Bornstein*, 423 U.S. at 309-13.

2. *Section 3729(a)(2) applies.*

Section (a)(2) reads:

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

31 U.S.C. § 3729(a)(2). The distinction between this and Section (a)(1) is that a plaintiff must also show that the defendant "made or used (or caused someone else to make or use) a false record in order to cause the false claim to be actually paid or approved." *Zimmer*, 386 F.3d at 242.

No where does this clause contain a requirement that the wrongdoer "present" a false claim to the government, and this Court should not read into it

such a requirement. Again, Section 3729(a)(2) has a different purpose than (a)(1). Because (a)(2) only covers situations where federal funds were actually lost due to fraud, there was no need for Congress to add the same safety check found in (a)(1) of requiring a presentment of a false claim where civil penalties are imposed without wrongful payment of federal funds.

Again, the seven parts of Section 3729(a) are worded differently to ensure that the FCA covers every conceivable instance where a person tries to or succeeds in obtaining federal funds by means of falsity. Therefore, it would not be appropriate for this Court to inject language into Section 3729(a)(2) or (3), which would improperly narrow the FCA and open the door to loopholes.

The evidence in the record of this case demonstrates that the claims at issue had been presented to the Navy. Accordingly, it is not necessary for this Court to impose a requirement into Section 3729(a)(2) or (3) that claims be presented to the government in order to properly rule upon this case. Again, there could not be a more classic case of the application of Section 3729(a)(1) or (2) than a subcontractor fraud case, such as this one.

CONCLUSION

This Court should affirm the Sixth Circuit's reversal of the district court's dismal of the case, but it should remand the entire case back to the district court to apply the proposed three-step standard for evaluating whether the Petitioners violated the FCA.

Joel D. Hesch
Liberty University School of Law
1971 Univ. Blvd.
Lynchburg, VA 24502
(434) 592-4251

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

82 58306 (16) 37p90

No. 07-214

Supreme Court, U.S.
FILED
JAN 22 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., ET AL.,
Petitioners,

v.

UNITED STATES EX REL. ROGER L. SANDERS
AND ROGER L. THACKER,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JOSEPH E. B. WHITE
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-4826

DAVID C. FREDERICK
Counsel of Record
BARRETT C. HESTER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus
Taxpayers Against Fraud Education Fund

January 22, 2008

QUESTION PRESENTED

Whether United States Navy subcontractors that make false claims for federal Government money can be liable under 31 U.S.C. § 3729(a)(2) or (a)(3) of the False Claims Act, even if the subcontractors' false claims were not presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE PLAIN LANGUAGE, STRUCTURE, AND STATUTORY ORIGINS OF THE FALSE CLAIMS ACT DEMONSTRATE THAT PRESENTMENT OF A CLAIM TO THE GOVERNMENT IS NOT REQUIRED 6

A. The Plain Language Of The Statute Does Not Require Presentment 6

1. Section 3729(c) clearly demonstrates congressional intent not to require presentment 6

2. The plain language of Section 3729(a)(2) contains no presentment requirement 10

3. Section 3729(a)(3)'s broad conspiracy provision contains no presentment requirement 12

B. The Statutory Structure Of The FCA Confirms The Lack Of A Presentment Requirement In This Case 13

1. Section 3729(a)(1) logically contains a presentment requirement while Section 3729(a)(2) does not 14

2. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with Section 3729(c)'s inclusive definition of "claim" 15

C. The FCA's Statutory History Is Consistent With The Lack Of A Presentment Requirement In Sections 3729(a)(2) And (a)(3) 16

II. CONSTRUING THE FALSE CLAIMS ACT NOT TO CONTAIN A PRESENTMENT REQUIREMENT ENSURES THAT VAST AMOUNTS OF FRAUD REMAIN WITHIN THE SCOPE OF THE ACT 18

A. Congress Intended The 1986 Amendments To Overrule Cases That Limited The FCA's Scope Of Coverage And To Approve Broad Judicial Interpretations Of The FCA 18

B. Accepting Petitioners' Interpretation Would Remove Vast Amounts Of Fraud From The FCA's Reach 23

1. The 1986 amendments ensure that the FCA protects federal funds broadly even when those funds are spent through grants and contracts 23

2. The FCA's reach is limited to frauds involving federal funds 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004) 12, 17

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 3-4, 10, 17

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 4, 15

Richards v. United States, 369 U.S. 1 (1962) 15

Stone v. INS, 514 U.S. 386 (1995) 12

United States v. Azzarelli Constr. Co., 647 F.2d 757 (7th Cir. 1981) 18, 19, 20, 24

United States v. Centennial Sav. Bank FSB, 499 U.S. 573 (1991) 9

United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868) 15

United States v. Neifert-White Co., 390 U.S. 228 (1968) 24, 28

United States v. Wilson, 503 U.S. 329 (1992) 8, 9

United States ex rel. Atkins v. McInteer, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) 22

United States ex rel. Davis v. Long's Drugs, Inc., 411 F. Supp. 1144 (S.D. Cal. 1976) 4, 5, 20, 21, 22

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 23, 24

United States ex rel. Salzman v. Salant & Salant, Inc., 41 F. Supp. 196 (S.D.N.Y. 1938) 18, 19, 20

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) 9, 11, 12, 17, 22

Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997) 9

STATUTES AND RULES

False Claims Act, 31 U.S.C. §§ 3729-3733:

§ 3729(a) 26

§ 3729(a)(1) 3, 9, 10, 12, 14, 16, 17

§ 3729(a)(2) (1982) 11

§ 3729(a)(2) 3, 4, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 29

§ 3729(a)(3) 3, 4, 6, 9, 12, 13, 15, 16, 17, 29

§ 3729(c) 3, 4, 6, 7, 8, 9, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 27, 28

18 U.S.C. § 1349 13

18 U.S.C. § 1956(a)(1) 28

18 U.S.C. § 1957(a) 28

31 U.S.C. § 231 (1976) 16, 17

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 4, 5, 18, 19, 21, 22, 24, 25

ADMINISTRATIVE MATERIALS

Budget of the United States Government: Historical Tables Fiscal Year 2008 (2007), *available at* http://www.gpoaccess.gov/usbudget/fy08/hist.html 23

OTHER MATERIALS

2A Norman J. Singer, *Statutes and Statutory Construction* (5th ed. 1992) 7, 15

USASpending.gov, http://www.usaspending.gov 26

INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

INTRODUCTION

Since its enactment in 1863, the False Claims Act ("FCA") has been the Government's primary tool for ensuring that federal funds are not misused or diverted from their intended purpose, thereby protecting the public from the unnecessary costs of government expenditures for inflated construction costs, defective military materiel, and improper health care reimbursements. Petitioners and their *amici* argue, however, that the FCA has the strictly delimited purpose of protecting the federal treasury only when fraudulent claims are submitted directly to the Government and that the FCA has no role in protecting

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

federal funds spent through an intermediary to accomplish their intended public purpose. In this case, petitioners and their *amici* assert that the Government and the public are not defrauded within the meaning of the FCA when a skilled nursing facility receives substandard supplies purchased with federal Medicare dollars (Chamber Br. 12); that the Government and the public are not defrauded when a hospital has to provide a lower quality of care to its Medicare patients because a vendor overcharges the hospital for services paid out of a fixed amount of federal funds (*id.*); and that the Government and the public are not defrauded when federal dollars are used to pay for defective components of *Arleigh Burke* class guided missile destroyers built for the United States Navy (Pet. Br. 34-35).

The dismissive characterization of such conduct as "fraud perpetrated by one private party against another" (Pet. Br. 33; *see also* Chamber Br. 5, 18) ignores the substantial harm that the Government and the public suffer when waste and abuse reduce the quantity and quality of products and services that taxpayers' funds can provide. Once the Government distributes funds to contractors and grantees, it maintains a strong interest in ensuring that the funds are spent for their intended purpose. The Government does not transfer money or property to contractors and grantees just for the sake of transferring funds. The FCA not only sensibly protects the formalistic transfer of funds from the federal Government to a direct recipient but also provides a remedy and deterrent when a subcontractor of that recipient commits fraud in the use of federal funds.

SUMMARY OF ARGUMENT

The 1986 amendments to the False Claims Act ("FCA") explicitly clarify that the FCA encompasses frauds perpetrated indirectly against the Government by recipients of funds from federally funded contracts and programs. The FCA's broad coverage of frauds committed against recipients of federal funds is confirmed by its plain language, structure, statutory origins, legislative history, and purpose. The Sixth Circuit correctly applied the FCA in holding that presentment of a claim to the Government is not required to violate the FCA, and the decision below should accordingly be affirmed. A contrary result would undermine the 1986 amendments and allow substantial amounts of fraud involving federal funds to go unchecked.

The plain language of Section 3729(c), which was added to the FCA in 1986, evinces Congress's intent to include fraud committed by subcontractors and other downstream recipients of federal funds, regardless of whether the subcontractors' claims are ultimately presented to the Government. Section 3729(c) defines "claim" to include claims for money or property made "to a contractor, grantee, or other recipient" of federal funds where "any portion" of the requested money or property comes from the Government. 31 U.S.C. § 3729(c). Requiring a claim to be presented directly to the Government would be inconsistent with Section 3729(c)'s explicit inclusion of claims submitted to a "recipient" of federal money.

Nor does the plain language of either Section 3729(a)(2) or (a)(3) contain any presentment requirement. The absence of a presentment requirement in subsections (a)(2) and (a)(3) is significant in light of the explicit inclusion of a presentment requirement in Section 3729(a)(1). *See Barnhart v.*

Sigmon Coal Co., 534 U.S. 438, 452 (2002) (noting significance of disparate inclusion and exclusion of statutory language in different sections of same act).

Moreover, the lack of a presentment requirement in Sections 3729(a)(2) and (a)(3) is complemented by the structure of the FCA and the statutory origins of those sections. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with the addition of Section 3729(c) to the FCA and violate this Court's "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted). That contextual understanding gains support from the statutory history of the FCA, which establishes that predecessor versions of Sections 3729(a)(2) and (a)(3) did not contain a presentment requirement either.

Although the plain language, structure, and statutory history of the Act suffice to demonstrate the lack of a presentment requirement, the legislative history of the 1986 amendments to the FCA also squarely supports the Sixth Circuit's decision that presentment to the federal Government is not required. Congress intended to abrogate decisions that interpreted the FCA too restrictively by requiring the presentment of a claim to the Government or by requiring monetary loss to the Government. *See* S. Rep. No. 99-345, at 21-22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Congress also expressed its approval of cases such as *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976), in which the court held that "false claims submitted to a state Medicaid program, such as MediCal, are claims against the United States within

the meaning of the False Claims Act," *id.* at 1149. *See* S. Rep. No. 99-345, at 22.

Finally, Congress enacted the 1986 amendments against the backdrop of an inexorable shift in federal spending from direct expenditures by the Government to indirect expenditures through block grants and other transfers of federal funds to state and local governments and private entities. In giving greater flexibility for such funds to be expended without precise federal mandates or a direct relationship between the ultimate recipient of the funds and the Government, Congress did not intend to insulate those transactions from the FCA's purview. As even petitioners' *amici* acknowledge, "[t]he federal Government pours hundreds of billions of dollars into the economy each year through contracts and grants." Chamber Br. 6. Removing such a vast amount of federal funds from the protection of the FCA would substantially weaken the FCA and make it a much less effective tool to combat fraud and to ensure the proper use of federal funds. Congress amended the FCA in 1986 precisely to avoid that result.

ARGUMENT

I. THE PLAIN LANGUAGE, STRUCTURE, AND STATUTORY ORIGINS OF THE FALSE CLAIMS ACT DEMONSTRATE THAT PRESENTMENT OF A CLAIM TO THE GOVERNMENT IS NOT REQUIRED

The addition of Section 3729(c) to the False Claims Act ("FCA") in 1986 clearly demonstrates that Congress did not intend for presentment to the Government to be a condition of liability under Sections 3729(a)(2) and (a)(3). Because Section 3729(c) is key to understanding that Sections 3729(a)(2) and (a)(3) contain no presentment requirement, our analysis of the plain language of the FCA begins with Section 3729(c) – the FCA's expansive definition of the term "claim" – and then considers the plain language of Sections 3729(a)(2) and (a)(3). The absence of any presentment requirement in the text of Sections 3729(a)(2), (a)(3), and (c) is further supported by the statutory structure of the FCA and its legislative origins.

A. The Plain Language Of The Statute Does Not Require Presentment

1. Section 3729(c) clearly demonstrates congressional intent not to require presentment

In 1986, Congress added Section 3729(c) to the FCA to clarify that presentment of a claim to the Government is not required to trigger liability under Sections 3729(a)(2) and (a)(3) of the FCA. Rather, Section 3729(c) ensures that the FCA also covers claims that are submitted to any recipient of federal funds. Section 3729(c) provides in its entirety:

> **Claim defined.**—For purposes of this section, "claim" includes any request or demand,

> whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). By the language it chose, Congress intended for that definition to be additive and not exhaustive. The term "includes" denotes an expansive definition. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 152 (5th ed. 1992) (noting that the term "includes" is a term of enlargement and conveys the conclusion that other items not enumerated are includable). Although Congress could have limited the definition of a "claim" to the situation in which a prime contractor submits a request for payment directly to the Government, it chose not to limit the definition in that way.[2] The plain language therefore evinces the intent for Section 3729(c) to ensure that the FCA covers not just the straightforward case of a prime contractor's direct submission of a claim to the Government but also a subcontractor's request or demand to a prime contractor, as long as "any portion of the money or property which is requested or demanded" comes from the federal Government.

Section 3729(c) contains a logical and necessary limiting requirement that some portion of the

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[2] The statute's definition of "claim" does not even cover a prime contractor's direct submission of a claim to the Government, providing further evidence that Section 3729(c)'s definition of "claim" is an enlarging rather than exhaustive definition.

requested money or property come from the federal Government. The FCA is not intended to cover frauds that do not involve federal funds or property. Claims made to contractors, grantees, or other recipients come within the Act's ambit "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property." 31 U.S.C. § 3729(c). That provision establishes the required nexus between the claim made to, *e.g.*, a contractor and the federal funds used by the contractor to pay the claim. But the plain language of subsection (c) contains no requirement that a claim be presented to the federal Government. Such a requirement would be antithetical to the very purpose of adding subsection (c) to clarify that the FCA covers claims that are presented to recipients of federal funds.

Congress's use of the phrases "if the United States Government provides" and "if the Government will reimburse" in Section 3729(c) does not constitute a presentment requirement. Congress's use of different verb tenses in these two clauses is significant. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Here, the use of different verb tenses indicates that Section 3729(c) covers two different situations: (1) the situation where the "contractor, grantee, or other recipient" of federal funds to whom a false claim is submitted has already received from the Government some portion of the money requested by the false claimant; and (2) the situation where the "contractor, grantee, or other recipient" will be reimbursed by the Government at

a later point in time for some portion of the money requested by the false claimant.[3]

That interpretation of Section 3729(c) also is consistent with a common-sense reading of the statute based on the use of words in common parlance. *See United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 582 (1991) (explaining that a "common-sense reading of the statutory language best comport[ed] with the purpose" of the statute at issue); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207-08 (1997) (relying on word's use in "common parlance" to interpret statutory language). The word "provides" commonly identifies something's source. Consider the example of a student researching a federally funded highway construction project being built by a state transportation department. If the student asked the project manager, "Who provides

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[3] In attempting to reconcile Section 3729(c) with Section 3729(a)(1) – which is not at issue in this case and which, unlike Sections 3729(a)(2) and (a)(3), contains an explicit presentment requirement (*see infra* p. 10) – the D.C. Circuit focused on the use of the present-tense form of the verb "provides" in Section 3729(c), explaining that "False Claims Act liability will attach if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004). That reading, however, functionally converts Congress's use of the present tense in the statute to the future tense, making liability contingent upon some event transpiring at a later point in time. *Totten* thus disregards its own recognition "of the Supreme Court's admonition that 'Congress' use of a verb tense is significant in construing statutes.'" *Id.* (quoting *Wilson*, 503 U.S. at 333). If Congress had intended for liability to be contingent on a future payment of money or property by the federal Government, it would have drafted Section 3729(c) to read, "if the United States Government *will* provide any portion of the money . . . ," just as it drafted the immediately following clause to read, "if the Government *will* reimburse," 31 U.S.C. § 3729(c) (emphasis added).

the funding for this project?," the project manager's answer would not hinge on whether the federal Government had already transferred all of the federal funds for the project to the state or whether it continued to pay out funds to the state on an ongoing basis. Either way, the correct, and commonsense, answer to the question would be, "The federal Government."

2. The plain language of Section 3729(a)(2) contains no presentment requirement

The plain language of Section 3729(a)(2) contains no presentment requirement. Section 3729(a)(2), which was created when the FCA was recodified in 1982, makes any person liable under the FCA who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2).[4] The absence of a presentment requirement in that subsection stands in stark contrast to subsection (a)(1), which makes any person liable who "knowingly presents, or causes to be presented," a false claim to the Government. *Id.* § 3729(a)(1). Congress's exclusion of a presentment requirement from subsection (a)(2) is significant in the face of its inclusion of a presentment requirement in subsection (a)(1). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a

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[4] The phrase "by the Government" was added in 1986. As discussed below, this phrase does not introduce a presentment requirement. Rather, the jurisdictional phrase was added to remedy an inadvertent defect in the pre-1986 version, which failed to provide any limitation of the scope of subsection (a)(2) to federal frauds.

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Congress clearly knew how to include a presentment requirement when it wanted to, but chose not to do so in Section 3729(a)(2).

Nor did the addition of the phrase "by the Government" at the end of Section 3729(a)(2) in 1986 add a presentment requirement to subsection (a)(2). Rather, the addition of that phrase cured a jurisdictional defect in subsection (a)(2) that Congress inadvertently introduced when it recodified the FCA in 1982. Without the phrase "by the Government," subsection (a)(2) contained no limitation whatsoever on what kind of claims were covered by the FCA. Because subsection (a)(2) made any person liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved," 31 U.S.C. § 3729(a)(2) (1982), the absence of a definition of claim in the FCA meant that even purely private claims would have been covered by the plain language of the statute. When Congress added an inclusive rather than exhaustive definition of the term "claim" to the FCA in 1986, *see supra* pp. 6-7, its addition of the phrase "by the Government" to Section 3729(a)(2) cured the federal jurisdictional defect in the version of that subsection that existed from 1982 to 1986.

The *Totten* court concluded that Congress must have added the words "by the Government" for the purpose of "referring back to the presentment requirement of Section 3729(a)(1)." 380 F.3d at 499. *Totten* based its conclusion on the principles of statutory construction that (1) where avoidable, "'no

clause, sentence, or word shall be superfluous, void, or insignificant,'" *id.* (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004)), and (2) "'when Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect,'" *id.* (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)) (alteration omitted). The *Totten* court failed to recognize that Congress needed to add the words "by the Government" to cure the jurisdictional defect in Section 3729(a)(2), thus addressing both preceding principles of statutory construction about which the *Totten* court professed concern. Had it recognized that the phrase was added to cure the jurisdictional defect in subsection (a)(2) that existed from 1982 to 1986, the *Totten* court presumably would not have had to develop the less persuasive explanation that Congress intended the phrase to refer back to subsection (a)(1)'s presentment requirement.[5]

3. Section 3729(a)(3)'s broad conspiracy provision contains no presentment requirement

The plain language of the FCA's broad conspiracy provision does not contain a presentment requirement either. Section 3729(a)(3), in its entirety, makes any person liable who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). The plain language of that subsection could not be

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[5] If Congress had intended to add a presentment requirement to Section 3729(a)(2), it likely would have done so in a much less cryptic manner by tracking the straightforward language used in subsection (a)(1), making any person liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *presented to the Government* for payment or approval."

clearer, and notably subsection (a)(3) cannot be read to require presentment of a claim to the Government. Section 3729(c)'s explicit definition of "claim" to include any request to a "contractor, grantee, or other recipient" of federal funds simply provides further support for the conclusion that Congress did not intend Section 3729(a)(3) to contain a presentment requirement.

Petitioners and their *amici* understandably shy away from Section 3729(a)(3)'s plain language. Instead, they attempt to assert that the scope of liability under subsection (a)(3) is "defined by the scope of liability under Sections 3729(a)(1) and (a)(2)." Pet. Br. 29. But that is not how Congress drafted subsection (a)(3). Had Congress wished to limit subsection (a)(3) in that way, it simply would have drafted the conspiracy provision to make any person liable who "conspires to violate paragraph (1) or (2) of this section." *See, e.g.*, 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

B. The Statutory Structure Of The FCA Confirms The Lack Of A Presentment Requirement In This Case

The FCA's structure confirms that, consistent with their plain language, Sections 3729(a)(2) and (a)(3) do not impose a requirement that a claim be presented to the federal Government to be covered by the FCA.

1. Section 3729(a)(1) logically contains a presentment requirement while Section 3729(a)(2) does not

The statutory structure of the FCA supports the inclusion of a presentment clause in subsection (a)(1) but not in subsection (a)(2). Subsection (a)(1) intends to cover the kind of false document, such as an invoice, that either might be presented directly to the Government by a contractor[6] or might be forwarded without change from a prime contractor to the Government for payment after the prime contractor receives the invoice from a subcontractor.[7] Subsection (a)(2) covers the kind of false document that a subcontractor might submit for payment to a prime contractor that does not simply forward the false document to the Government without change. Rather, the prime contractor either pays the subcontractor using federal funds the contractor has already received or incorporates the subcontractor's false information into an invoice that the contractor submits to the Government for reimbursement. Sections 3729(a)(1) and (a)(2) thus cover both the situation in which a false claim is presented to the Government and the situation in which a false document is used by a subcontractor to induce a recipient of federal funds to pay the subcontractor. Such a reading explains why subsection (a)(1) contains a presentment clause while subsection (a)(2) does not, and it gives effect to the plain language of Sections 3729(a)(1) and (a)(2) without conflicting with Section 3729(c).

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[6] The contractor "knowingly presents" the false claim to the Government.

[7] The subcontractor "causes [the false claim] to be presented" to the Government by the contractor.

2. *Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would conflict with Section 3729(c)'s inclusive definition of "claim"*

Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) of the FCA would conflict with Section 3729(c)'s inclusive definition of "claim" that includes claims submitted to a "contractor, grantee, or other recipient" of federal funds. This Court has consistently followed the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citation omitted). Rather than focusing on a single section in isolation to interpret a statute, the Court should "adopt that sense of [the] words which best harmonizes with [the] context and promotes [the] policy and objectives of [the] legislature." *Id.* at 221 n.10 (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)); *see also Richards v. United States*, 369 U.S. 1, 11 (1962) ("[W]e must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy.") (internal quotation marks and alteration omitted); 2A Singer, *Statutes and Statutory Construction* § 46.05, at 103 (noting need to construe each section in connection with other sections). Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) would undermine the 1986 addition of Section 3729(c)'s inclusive definition of "claim" to the FCA. Such an interpretation is contrary to the plain language of Sections 3729(a)(2) and (a)(3) and would conflict with the FCA's overall objective to apply broadly to frauds involving federal money or property, even when a claim

is presented to a "contractor, grantee, or other recipient" of federal funds. 31 U.S.C. § 3729(c).

C. The FCA's Statutory History Is Consistent With The Lack Of A Presentment Requirement In Sections 3729(a)(2) And (a)(3)

The lack of a presentment requirement in the plain language of current Sections 3729(a)(2) and (a)(3) is consistent with prior versions of the FCA. Before Sections 3729(a)(1) and (a)(2) were broken out into separate sections in 1982, they were part of the same section. In relevant part, that section made any person liable

> [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any *claim upon or against the Government of the United States, or any department or officer thereof*, knowing *such claim* to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill, receipt, voucher . . . ."

31 U.S.C. § 231 (1976) (emphases and enumeration added). The first reference to "claim" is unambiguously modified immediately thereafter by the words "upon or against the Government of the United States, or any department or officer thereof." Subsequent references to such claim clearly refer back to a claim upon or against the United States or one of its departments, *i.e.*, a claim for federal funds.[8] As in

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[8] Petitioners argue for a far more unnatural reading that "such claim" refers to a claim that "'would be presented or

the current version of Sections 3729(a)(1) and (a)(2), the explicit inclusion of a presentment requirement in the first clause of Section 231 makes the omission of a presentment requirement in the second clause significant. *See Barnhart*, 534 U.S. at 452.

Similarly, prior to the 1982 recodification, the FCA's conspiracy provision did not contain a presentment requirement. The conspiracy clause of Section 231 made any person liable "who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." 31 U.S.C. § 231 (1976). Accordingly, the precursor of neither current Section 3729(a)(2) nor Section 3729(a)(3) contained a presentment requirement even before the 1982 recodification of the FCA.

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caused to be presented to the United States.'" Pet. Br. 21 (quoting *Totten*, 380 F.3d at 500). In arguing against the *Totten* dissent's straightforward reading, the majority stated that it failed "to see how the dissent's reading is any different from our own: a claim could not be upon or against the Government unless it was presented to the Government." 380 F.3d at 500 n.7. The majority opinion thus appears to take the position that the phrase "present or cause to be presented" in Section 231 does the same work as the phrase "upon or against the Government," even though both phrases appear in the same clause. That explanation, however, is inconsistent with the *Totten* majority's own invocation of the "'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Id.* at 499 (quoting *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 489 n.13).

II. CONSTRUING THE FALSE CLAIMS ACT NOT TO CONTAIN A PRESENTMENT REQUIREMENT ENSURES THAT VAST AMOUNTS OF FRAUD REMAIN WITHIN THE SCOPE OF THE ACT

A. Congress Intended The 1986 Amendments To Overrule Cases That Limited The FCA's Scope Of Coverage And To Approve Broad Judicial Interpretations Of The FCA

The legislative history of the 1986 amendments complements the plain language and structure of the statute and confirms that Congress amended the FCA in 1986 to ensure that presentment of a claim to the federal Government is not required to trigger liability under the FCA. Congress specifically intended for Section 3729(c) to overrule by statute such decisions as *United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938), and *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). *See* S. Rep. No. 99-345, at 21-22 (1986) (discussing addition of Section 3729(c)), *reprinted in* 1986 U.S.C.C.A.N. 5266.[9] Reading a presentment requirement into the FCA would conflict with Congress's goal of abrogating those decisions.

In *Salzman*, the court dismissed the plaintiff's FCA suit against a defendant that had allegedly presented false claims to the Red Cross. Although the

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[9] The Senate Report's section-by-section analysis of the provision now codified at 31 U.S.C. § 3729(c) refers to "subsection (d)" due to Congress's intervening elimination of an unrelated, proposed subsection (b) dealing with consequential damages. *See* S. Rep. No. 99-345, at 20, 21. Subsection (d) of the version of the bill analyzed in the Senate Report became the subsection that was ultimately enacted as Section 3729(c).

Red Cross received "a donation from the government and administered it for the purpose specified," the court concluded that the complaint did not state a cause of action under the FCA because the Red Cross was not part of the Government and the false claims had therefore not been presented to a department of the Government. *See* 41 F. Supp. at 197. The Senate Judiciary Committee, which had principal responsibility for the bill that became the 1986 amendments, cited *Salzman* with disfavor as an example of cases in which courts found the FCA to be inapplicable. It explained that "[s]ome courts have concluded that once the United States has made the grant to the State, local government unit, or other institution, it substantially relinquishes all control over the disposition of the money or commodities." S. Rep. No. 99-345, at 21. The Committee then noted that "the judicial determination may follow that a fraud against the grantee does not constitute a fraud against the Government of the United States with the result that the False Claims Act is inapplicable." *Id.* In summarizing its reasons for adding Section 3729(c) to the FCA, the Committee clearly and unambiguously indicated its intention to overrule such "cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds." *Id.* at 22. Consequently, under the amended FCA, the allegedly fraudulent claims presented to the Red Cross in *Salzman* would have been actionable, even though the claims were not presented to the Government.

Section 3729(c) also was intended to overrule *Azzarelli*. *See id.* *Azzarelli* involved false claims submitted to a highway project in Illinois for which the federal Government provided 70 percent of the

funds, through the State of Illinois. *See* 647 F.2d at 758. The federal Government's contribution of highway funds to the State of Illinois was a fixed sum each year. The federal Government was thus insulated from any risk of loss resulting from overcharges related to the submission of false claims to the highway project. *See id.* at 761. Because the federal contribution was a fixed sum and the federal Government consequently did not suffer any financial injury, the *Azzarelli* court affirmed the district court's dismissal of the FCA complaint. *See id.* at 762.

Congress's intention to overrule *Azzarelli*, therefore, disproves petitioners' suggestion that Congress intended for Section 3729(c) to apply only when the payment of a false claim made to a party other than the Government would ultimately result in a loss to the Government. *See* Pet. Br. 28. *Azzarelli* presented a situation in which no loss could have resulted to the federal Government due to the fixed nature of the Government's contribution to the State of Illinois. By adding Section 3729(c) to overrule *Azzarelli*, Congress clearly intended for the FCA to apply even when no loss would result to the federal Government. Accordingly, it makes no difference under Section 3729(c) whether the Government has already provided the funds to the "contractor, grantee, or other recipient" or whether it "will reimburse such contractor, grantee, or other recipient" at some later date. *See supra* pp. 6-10.

The Sixth Circuit's interpretation of the FCA not only is consistent with Congress's intent to overrule cases like *Salzman* and *Azzarelli* but also gives effect to legislative approval of the decision in *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976). The Senate Report

approvingly discussed *Davis* in some detail. *See* S. Rep. No. 99-345, at 22. In *Davis*, the plaintiff alleged that the defendants submitted numerous false claims to California's MediCal program, which was approximately 50 percent funded by the federal Government. *See* 411 F. Supp. at 1145. The precise question presented in *Davis* was "whether *claims presented to a state agency* in accord with the Federal Medicaid program . . . are claims against the United States government within the meaning of the Federal False Claims Act." *Id.* at 1144 (emphasis added). The court rejected the defendants' argument "that the mere fact that federal funds are advanced for a state program is insufficient to warrant a characterization of fraudulent claims under that program as claims against the United States government." *Id.* at 1146. Instead, *Davis* concluded that "claims filed under the state program should be considered claims against the United States within the meaning of the False Claims Act." *Id.* at 1147.

In its approving discussion of *Davis*, the Senate Report focused on the fact that *Davis* held that "claims submitted to MediCal" came within the scope of the FCA. S. Rep. No. 99-345, at 22. Moreover, the Report concluded its discussion of *Davis* by indicating that "[s]imilar reasoning should apply in other circumstances where claims are submitted to State, local, or private programs funded in part by the United States." *Id.* Consistent with the plain language of Section 3729(c), the legislative history of the 1986 amendments discusses both the cases that Congress sought to overrule and those it approved. That explanatory history demonstrates Congress's intent for Section 3729(c) to ensure that narrow judicial

readings of the FCA would not unduly limit its scope.[10]

The opening and concluding sentences of the Senate Report's "section-by-section analysis" of subsection (c) perhaps best explain congressional intent in adding Section 3729(c): (1) "New subsection ([c]) clarifies that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of Federal funds," *id.* at 21 (opening sentence); and (2) "Thus, the Committee intends the new subsection ([c]) to overrule *Azzarelli* and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds," *id.* at 22 (concluding sentence). Upholding the Sixth Circuit's decision would promote the clear purpose of Section 3729(c) as articulated by Congress, whereas a contrary decision would substantially limit the FCA's ability to reach fraud perpetrated on recipients of federal funds.

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[10] In *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff'd on other grounds*, 470 F.3d 1350 (11th Cir. 2006), the court dismissed an FCA case involving allegedly false claims submitted by the defendants to the Alabama Medicaid Agency. The court noted that 70 percent of the Alabama Medicaid Agency's costs were borne by the United States. *See id.* at 1304. However, because the Alabama Medicaid Agency's rules did not require the subsequent submission of the claim to the federal Government, the court embraced *Totten*'s logic and dismissed the complaint, "finding no basis in the FCA for a relator to pursue recovery on behalf of the United States for fraud of the kind allegedly perpetrated upon . . . the Alabama Medicaid Agency." *Id.* at 1304, 1306. Such a result is inconsistent with Congress's approval of *Davis*.

B. Accepting Petitioners' Interpretation Would Remove Vast Amounts Of Fraud From The FCA's Reach

1. The 1986 amendments ensure that the FCA protects federal funds broadly even when those funds are spent through grants and contracts

The correct interpretation of the FCA, set forth above, ensures that the Act continues to function as an effective tool for combating fraud involving federal funds. On the other hand, accepting petitioners' construction could result in vast amounts and categories of fraud involving federal funds falling outside the coverage of the protective umbrella provided by the FCA. Between this Court's 1943 decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and Congress's amendment of the FCA in 1986, federal spending in the form of grant payments alone increased from $900 million to more than $112 billion. Even measured as a percentage of total federal government outlays, grant spending increased tenfold from 1.2 percent in 1943 to 11.3 percent in 1986. *See Budget of the United States Government: Historical Tables Fiscal Year 2008*, Table 6.1 – Composition of Outlays: 1940-2012 (2007), *available at* http://www.gpoaccess.gov/usbudget/fy08/hist.html. Congress thus added Section 3729(c) to the FCA in 1986 against the backdrop of a dramatic shift in the deployment of federal funds from direct spending to spending through grantees and other recipients of federal funds.

Congress added Section 3729(c) in 1986 to ensure that, notwithstanding the changing nature of federal spending, federal funds would continue to be protected by the FCA by virtue of subsection (c)'s enlargement of the definition of "claim" to include

claims made to contractors, grantees, and other recipients of federal funds. The Senate Report explicitly identified the purpose of the 1986 amendments as "mak[ing] the statute a more useful tool against fraud in modern times." S. Rep. No. 99-345, at 2. Petitioners and their *amici* attempt to portray Congress's successful protection of federal funds through the FCA as a parade of horribles resulting in the potential applicability of the Act to "billions of dollars' worth" of transactions. Chamber Br. 13; *see also* Pet. Br. 33-35. But providing broad protection of federal funds is exactly what Congress intended the FCA to do and is consistent with how this Court has directed that the FCA should be interpreted. *See United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Marcus*, 317 U.S. at 541-42 & n.5. Petitioners' attempt to remove billions of dollars of federal expenditures from the FCA's coverage cannot be squared with the clear language and purpose of the FCA.

Contrary to petitioners' and their *amici*'s arguments, the FCA protects the federal Government and the public from the harm caused by fraud more broadly than when there is an "immediate financial detriment to the Federal Treasury." WLF Br. 6; *see also* Pet. Br. 28 (emphasizing need for payment of false claim to result in loss to the United States). That argument is inconsistent with Congress's explicit statement of its intent to overrule *Azzarelli*. *See* S. Rep. No. 99-345, at 22. And it cannot be reconciled with the Senate Report's plain but powerful statement that "[t]he cost of fraud cannot always be measured in dollars and cents." *Id.* at 3. The Senate Judiciary Committee's example of how "fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs" is particularly fitting in the context of the defective

generator sets built for the Navy destroyers in this case:

> Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scen[a]rio exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security.

Id. Congress clearly intends for the FCA to protect the use of federal funds for their intended purpose, not just the formalistic transfer of those funds from the federal treasury to the contractors, grantees, and other recipients that are responsible for spending the money entrusted to them by the Government.

Even where the federal treasury does not suffer an immediate financial loss, the FCA acts as more than just "a purely punitive statute" as claimed by *amicus* Washington Legal Foundation. WLF Br. 26. It acts of course as the strong deterrent against fraud intended by Congress. *See* S. Rep. No. 99-345, at 4 (describing FCA as a "powerful tool in deterring fraud"); *see also* Chamber Br. 17 (recognizing powerful deterrent effect of FCA lawsuits).[11] Moreover,

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[11] Contrary to the arguments of *amici* Chamber of Commerce, American Hospital Association, and American Health Care Association, private parties involved in federal projects do not "have every incentive to investigate and resolve claims of contract non-compliance." Chamber Br. 18. Rather, prime contractors actually may have a disincentive to ferret out fraud in many circumstances. By remaining ignorant of their subcontractors' deficient performance or substitution of lower quality parts, prime contractors can avoid any financial detriment to

the FCA's damages provision does not result in "a windfall" to the Government in such circumstances. WLF Br. 26. Rather, the damages that "the Government sustains," 31 U.S.C. § 3729(a), would be no different than damages in a product substitution case where a party contracts for a particular product but receives a lower quality product instead. The Government's damages would compensate it for the difference in the quality of the product it should have received compared to the product it did receive, enabling the Government to procure replacement products if necessary. *Amicus*'s argument that Section 3729(a)'s damages provision requires presentment of a claim to the Government under the FCA is thus unavailing. *See* WLF Br. 24-25.

The federal Government spends more than $900 billion a year through contracts and grants. *See* USASpending.gov, http://www.usaspending.gov (chart listing contracts and grants for fiscal year 2006 totalling $905.8 billion). The FCA protects those funds from fraud by expansively defining "claim" to include any request or demand for those funds, even when the request is made to one of the contractors, grantees, or other recipients of that federal largesse rather than to the federal Government itself. The Sixth Circuit's accurate interpretation of the FCA protects the integrity of those expenditures. A contrary interpretation, however, would fail to give effect to Congress's 1986 amendments to the FCA in recognition of the changing landscape of federal spending, and it would potentially remove billions of dollars of federal funds from the FCA's coverage.

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themselves, avoid liability under the FCA, and simultaneously avoid protracted disputes with their subcontractors to remedy the subcontractors' defective performance.

2. The FCA's reach is limited to frauds involving federal funds

Petitioners' concerns about the potentially boundless reach of the FCA do not provide a basis for reversing the Sixth Circuit's decision. Contrary to the specter raised by petitioners, the FCA would not "apply to *any* claim for payment submitted to *any* entity that receives federal funding." Pet. Br. 34. For liability to attach under Section 3729(c), some portion of the money requested by the false claimant from the contractor, grantee, or other recipient of federal funds must have been either provided by the federal Government or later reimbursed to the contractor, grantee, or other recipient by the federal Government. *See* 31 U.S.C. § 3729(c). It therefore remains an essential element of FCA liability to establish a nexus between some portion of the requested money or property and its federal source. That requirement imposes a practical limitation on the FCA's reach.

Moreover, the FCA's broad protection of federal funds is a product of the plain language of Section 3729(c). Congress ensured that the FCA would extend broadly to frauds involving federal funds by imposing liability for claims submitted to recipients of federal funds as long as "*any* portion" of the funds requested or demanded comes from the federal Government. *Id.* (emphasis added). Congress could have chosen to impose a more restrictive requirement, such as requiring that at least half (or even all) of the funds requested come from the federal Government, but it did not do so. Petitioners' discontent with the reach of the statute should thus be addressed to Congress rather than the Court.

Petitioners' purported concern that the Sixth Circuit's interpretation of the FCA will "vastly compli-

cate the task of trying FCA cases" (Pet. Br. 35) also is misplaced. Plaintiffs have the burden of establishing the federal origin of some portion of the money or property requested, and, to the extent they cannot do so, they will be unable to bring successful cases under the FCA. Petitioners' suggestion that "discovery and trial in FCA actions will be immeasurably complicated by efforts to trace the origin of funds used by federal grantees" (*id.* at 35-36) is similarly unavailing. Such tracing efforts are routine in the federal Government's myriad prosecutions for money laundering offenses, for example. *See* 18 U.S.C. § 1956(a)(1) (requiring proof that a prohibited financial transaction involve the proceeds of a specified unlawful activity); *id.* § 1957(a) (requiring proof of a "monetary transaction in criminally derived property").

In interpreting prior versions of the FCA, this Court has previously explained that it is a remedial statute whose provisions should be construed broadly. In *Neifert-White*, this Court explained why "claim" should be given an expansive reading: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." 390 U.S. at 232. Since the Court decided *Neifert-White*, Congress has added Section 3729(c)'s expansive definition of the term "claim," which further emphasizes Congress's intent for the FCA to apply broadly and to overrule decisions that interpreted it narrowly. Accordingly, consistent with the plain language of the FCA, its structure, legislative history, and purpose, as well as the Court's own admonition against reading the FCA restrictively, the Court should not

read a presentment requirement into Sections 3729(a)(2) and (a)(3).

CONCLUSION

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

JOSEPH E. B. WHITE
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-4826

DAVID C. FREDERICK
Counsel of Record
BARRETT C. HESTER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus
Taxpayers Against Fraud Education Fund

January 22, 2008